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No. (1)

Supreme Court, U.S.
FILED
08-263 AUG 25 2008
OFFICE OF THE CLERK

In The Supreme Court of the United States

JOHN ALVIS JACKSON, JR.
and
LARRY ANDREW CAREY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A. WHETHER AN UNPAID EMPLOYER CONTRIBUTION TO A COMPANY'S EMPLOYEE BENEFIT PLAN, SUCH AS A PENSION OR RETIREMENT PLAN, BECOMES AN ASSET OF THE PLAN BEFORE IT IS PAID INTO THE PLAN SUCH THAT AN OFFICER OF SUCH COMPANY CAN BE CONVICTED OF EMBEZZLING FROM THE PLAN WHEN THE COMPANY FAILS TO TIMELY FUND THE PLAN?

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PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

John Alvis Jackson, Jr. and Larry Andrew Carey petition for a writ of certiorari to review a judgment of the Fourth Circuit Court of Appeals affirming their convictions and sentences in the United States District Court for the Western District of Virginia.

OPINION BELOW

The opinion of the Fourth Circuit Court of Appeals affirming the Defendants' convictions and sentences is published and reproduced at Appendix 1. United States of America v. Jackson, 524 F.3rd 532 (4th Cir. 2000).

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on May 1, 2008, and the Defendants filed a timely petition for rehearing and petition for rehearing en banc. Those petitions were denied on May 27, 2008. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254. The Fourth Circuit Court of Appeals had jurisdiction by virtue of 28 U.S.C. Section 1291, and the United States District Court had jurisdiction pursuant to 18 U.S.C. Section 3231.

STATUTE INVOLVED

18 U.S.C. Section 664:

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined under this title, or imprisoned not more than five years, or both.

As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provisions of Title 1 of the Employment Retirement Income Security Act of 1974.

STATEMENT OF THE CASE

This case arose The Burruss Company (hereinafter "Burruss") in November 2000. Burruss was a manufacturer of wood products that had several facilities with a corporate office in the Western District of Virginia. Defendant John Alvis Jackson, Jr. (Jackson) was its president. Defendant Larry Andrew Carey (Carey) was its chief financial officer. Among other charges that are not at issue here, Jackson and Carey were indicted in the United States District Court for the Western District of Virginia for violating 18 U.S.C. Section 664, which makes it unlawful to embezzle from employee benefit plans and employee pension plans. Neither Jackson nor Carey had

embezzled funds from a Burruss employee benefit pension plan. Rather, the Government's theory of the case was that an employer contribution to an ERISA plan becomes an asset of the plan when it is due and owing; therefore, if an officer of a company fails to timely pay the employer contribution, then he can be guilty of embezzling from the plan.

The Defendant's moved for judgment of acquittal on the 18 U.S.C. section 664 counts arguing, based upon United States Courts of Appeal precedent, that there was no evidence that they had embezzled funds from any employee benefit pension plan. Rather, Burruss had failed to pay the 1999 employer contributions to the Plans and unpaid contributions are not assets of the Plan unless the Plans' documents contain language that declares otherwise. The Government argued that employer contributions become assets of the Plan when they are due and payable, in this case on December 31, 1999.

The United States District Court, while recognizing that there was a split of authority in the Circuit Courts of Appeal, accepted the government's argument and held that because the employer contribution became an asset of the plan when it was due and owing, because Jackson and Carey were officers of Burruss when Burruss failed to pay the contribution, they could be guilty of embezzling from the plan.

The evidence at trial showed, that Burruss maintained two pension plans – The Burruss Company Money Purchase Pension Plan

(hereinafter referred to as the "Company Plan") which was the subject of Count Eleven of the Indictment, and The Burruss Company Money Purchase Pension Plan & Trust for the Hourly Wage and Union Employees of the Alcoa Tennessee Division (hereinafter referred to as the "Union Plan"), which was the subject of Count Twelve of the Indictment. (Hereinafter sometimes referred to collectively as "the Plans"). These plans were intended to conform to and qualify under Sections 401 and 501 of the Internal Revenue Code of 1986, as amended.

The plan documents for the Company Plan consisted of a Defined Contribution Master Plan and Trust Agreement, Government Exhibit 64, JA at 2679, an Adoption Agreement, Government Exhibit 65, JA at 2763, (throughout this Petition, JA refers to the Joint Appendix filed in the Fourth Circuit) and a Summary Plan Description for The Burruss Company Money Purchase Pension Plan, Government Exhibit 66, JA at 2785. Similarly, the plan documents for the Union Plan consisted of a master plan, Government Exhibit 69, J.A. at 2834, an Adoption Agreement, Government Exhibit 67, JA at 2801, and a Summary Plan Description for The Burruss Company Money Purchase Pension Plan, Government Exhibit 68, JA at 2813.

The trustee of these Plans was Crestar Bank and its successor, Suntrust Bank. The Plan Administrator of both the Company Plan and the Union Plan was the employer, The Burruss Company.

Both of these plans were funded solely by

employer contributions. No funds were contributed by employees through wage withholding or any other means of contribution.

The evidence indicated that under Internal Revenue Service regulations, the 1999 employer contributions to both Plans were due on September 15, 2000. However, they were not paid by The Burruss Company on that date or at any time prior to the time that The Burruss Company filed the Chapter 11 petition in bankruptcy. Ultimately, the Plans were funded and no employee lost his or her pension account.

REASONS FOR GRANTING THE WRIT

THIS WRIT SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME IMPORTANT MATTER; SPECIFICALLY, WHEN UNPAID EMPLOYER CONTRIBUTIONS TO AN EMPLOYER BENEFIT PLAN, SUCH AS A PENSION OR RETIREMENT PLAN, BECOME ASSETS OF THE PLAN.

This writ should be granted because there is a split of authority in the United States Courts of Appeal regarding whether unpaid employer contributions to an employee benefit plan are assets of the plan. This Court should decide this issue to remedy inconsistent decisions regarding this important federal question that

encompasses civil as well as criminal law.

18 U.S.C. Section 664 provides that "[a]ny person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee benefit plan, or of any fund connected therewith, shall be fined under this title, or imprisoned not more than five years, or both."

The Defendants submit that they cannot be guilty of this crime because they did not embezzle assets of the Plans. Rather, they failed to fund the 1999 contributions to the Plans by September 15, 2000. The Government's position, which was adopted by the Panel, is that the contributions became an asset of the plan when they became due and payable to the plan, on December 31, 1999.

The Defendants submit that "the proper rule, developed by case law, is that unpaid employer contributions are not assets of a fund unless the agreement between the fund and the employer specifically and clearly declares otherwise". ITPE Pension Fund v. Hall, 334 F3d 1011 (11th Cir. 2003); Cline v. Industrial Maintenance Engineering and Contracting Company, 200 F.3d 1223 (9th Cir. 2000); see also, In re Bucci, 439 F.3d 635 (6th Cir. 2007)(assuming that the rule announced in ITPE Pension Fund v. Hall is the proper one); Kalda v. Sioux Valley Physician Partners, 481 F.3d 639 (8th Cir. 2007)(citing ITPE Pension Fund Hall with favor and holding that unpaid

contributions were not plan assets where the plan documents contained no vesting language regarding unpaid contributions); Young v. West Coast Industrial Relations Assoc. Inc., 763 F.Supp. 64, 75 (D.Del. 1991); but see, In re Luna, 406 F.3d 1192 (10th Cir. 2005); United States v. LaBarbara, 129 F.3d 81 (2d Cir. 1997).

The Government does not refute that the weight of authority holds that unpaid employer contributions to an ERISA plan are not assets of the plan absent language in the plan documents to the contrary. Nor does it contend that the plan documents at issue in this case contain such language. Instead, it relies on the Second Circuit holding in United States v. LaBarbara, 1299 F.3d 81 (2d Circuit 1997) and argues that employer contributions become assets of the plan when they are due and owing to the plan. In this case that would be December 31 of the plan year. The Panel in this case agreed with this argument. The Defendants submit that this holding is erroneous.

ERISA does not give a definition for what constitutes an "asset" of an ERISA plan. By regulation and without the requirement of a particularized agreement, unpaid employee contributions to ERISA funds are assets of those funds. 29 C.F.R. Section 2510.3-102 (2007). Significantly, no such regulation exists for employer contributions. Clearly, a plain interpretation of the term "asset" does not encompass future contributions not yet made. "Until the employer pays the employer contributions over to the plan, the contributions

do not become plan assets over which fiduciaries of the plan have fiduciary obligation." Cline, 200 F.3d at 1234; Collins v. Pensions and Insurance Comm. Of the Southern California Rock Prods. And Ready Mixed Concrete Ass'ns, 144 F.3d 1279, 1282 (9th Cir. 1998).

The Panel decision states that 29 U.S.C. Section 1103 provides that unpaid employer contributions must be held in trust. See pages 18-19 of the opinion. However, that is not the case. That statute states that plan assets must be held in trust, but does not define plan assets.

The exception to the rule that unpaid contributions are not plan assets is where the plan document itself identifies unpaid employer contributions as a plan asset. ITPE, 334 F.3d at 1013-1014. In the instant case the Plan documents contain no such language, as the United States concedes. Indeed, the Plan language indicates to the contrary.

The Company Plan defines "accrued benefit" as "the amount standing in a Participant's Account(s) as of any date derived from both Employer contributions and Employee contributions, if any." J.A. at 2692. The Union Plan defines "the fund" as consisting of "all contributions made under Article III (Employer Contributions) and Article IV (Employee Contributions) of the Plan and the investment thereof and earnings thereon." J.A. at 2916.

Neither Plan requires that contributions be made on any particular periodic basis, for example, monthly or weekly. Instead, the

Company Plan provides that "the Employer may pay its contribution for each Plan Year in one or more installments without interest. The Employer must make its contribution to the Plan within the time prescribed by the [Internal Revenue] Code or applicable Treasury regulations." J.A. at 2701. The Union Plan provides that "the Employer expects to make a contribution to the Plan each year in accordance with the following formula ...," J.A. at 2821, and "the Employer intends to make periodic contributions to the Plan... ." J.A. at 2867.

The Company Plan states that, "the Employer has the right, at any time, to suspend or discontinue its contributions under the Plan, and to terminate, at any time, this Plan and the Trust created under this Agreement." J.A. at 2748. The Union Plan also provides that the Employer can amend or terminate the Plan at any time.

Significantly, there is no language in either Plan that makes unpaid contributions assets of the plan. This silence as to unpaid contributions differentiates this case from others where the Courts held that unpaid contributions were assets of the Plan. For example, in Galgay v. Gangloff, 677 F.Supp. 295, 300-02 (M.D. Pa. 1987) the language in the underlying wage agreement provided that all monies "due and owing to the benefit fund were 'vested' in the fund. Id. In United States v. Panepinto, 818 F.Supp. 48 (E.D.N.Y. 1993), the agreement stated "neither the Associations as such nor any Employer shall have any legal or equitable right, title or interest in or to any sum paid by or

due from the Employer ... and of said benefit funds." The Court determined that "if the employer has no legal interest in any amounts he received that are 'due to' the funds, then plainly the Agreement makes these amounts 'assets' of the funds. Id. at 50-51. In Connors v. Paybra Mining Co., 807 F.Supp. 1242, 1246 (S.D. W. Va. 1992), the collective bargaining agreement stated, "*Title to all the monies* paid into *and/or due and owing* to the Trusts specified in this Article *shall be vested in and remain exclusively in the Trustees* of those Trusts." Id. (emphasis in original).

The Panel relied on two cases, In re Luna, 406 F.3d 1192 (10th Cir. 2005); United States v. LaBarbara, 129 F.3d 81 (2d Cir. 1997), to support its decision that unpaid contributions to an employee benefit plan are assets of the plan. Both of these cases are distinguishable from the instant case. In Luna, the collective bargaining agreement obligated the employer to make monthly contributions to the ERISA fund. The Plan documents in the instant case contain no such obligation.

Furthermore, in LaBarbara the collective bargaining agreement at issue did contain language that identified unpaid employer contributions as plan assets. Although it is not clear from the facts stated in the opinion, it appears that the collective bargaining agreement in LaBarbara required that contributions be made weekly. The Court notes, "employees would receive a weekly check from Strathmore for working up to thirty hours, and a corresponding contribution would be made to the

Funds." Id. at 83. Thus, the Court found that "once wages were paid to Local 66 members, Strathmore had contractual obligations to the Funds that constituted "assets" of the Funds by any common definition." Id. at 88. Such contractual language simply is absent in The Burruss Company Plans.

More importantly, the Defendants in LaBarbara had done far more than fail to fund the pension fund. They actually devised a scheme whereby the employees were given two paychecks by two separate entities. One entity contributed to the fund. The second entity was not a participant in the Plan so no weekly contributions to the fund were made. The Court stated that the Defendant's acquiescence in the use of the second entity to convert funds from the ERISA plan to the Defendant aided or abetted a violation of Section 664.

The Government argues that Appellants' reliance on the civil cases that require plan documents to state that unpaid employer contributions are plan assets is misplaced. Clearly, however, the term "asset" should be defined consistently in civil and criminal contexts.

Therefore, neither Luna nor LaBarbara stand for the proposition that unpaid contributions to an ERISA plan are automatically assets of the Plan without some contractual language to the contrary. Furthermore, neither case indicates that the failure to fund an ERISA Plan, without more, can constitute a violation of 18 U.S.C. Section

664.

Appellants submit that public policy favors adoption of the majority view because the Panel's holding will discourage the creation of employer funded benefit plans. Under the holding in this case, whenever an employer has elected to provide his or her employees with an employer benefit plan and she then fails to fund such plan by December 31st of the plan year then that employer has committed felony embezzlement. This would be the result regardless of the reason for the failure to fund. Such a result stifles employers' motivation to provide employee benefit plans to their employees.

CONCLUSION

For these reasons, Petitioners request that this Petition for Writ of Certiorari be granted, that the Fourth Circuit Court of Appeals be reversed with directions that the cases be remanded to the United States District Court for entry of judgment of acquittal as to Counts Eleven and Twelve as well as a re-sentencing of the Defendants because acquittal on these counts will affect the United States Sentencing Guidelines calculations.

Respectfully submitted,
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No. _____

In The Supreme Court of the United States

JOHN ALVIS JACKSON, JR.
and
LARRY ANDREW CAREY,
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APPENDIX

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United States Court of Appeals
for the Fourth Circuit

No. 07-4103 (L)
(6:04-cr-70118)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN ALVIS JACKSON,
Defendant-Appellant

ORDER

This Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Williams, Judge Motz, and Judge King.

For the Court

/s/ Patricia S. Connor, Clerk

United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
John Alvis JACKSON, Jr., Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Larry Andrew Carey, Defendant-Appellant.
Nos. 07-4103, 07-4094.
Argued: Jan. 31, 2008.
Decided: May 1, 2008.

COUNSEL

ARGUED: Melissa Windham Friedman, Anderson & Friedman, Roanoke, Virginia; Joseph Abraham Sanzone, Sanzone & Baker, P.C., Lynchburg, Virginia, for Appellants. Thomas Ernest Booth, United States Department of Justice, Washington, D.C., for Appellee. ON BRIEF: Anthony F. Anderson, Anderson & Friedman, Roanoke, Virginia, for Appellant John Alvis Jackson. John L. Brownlee, United States Attorney, Jennie M. Waering, Assistant United States Attorney, Office of the United States Attorney, Roanoke, Virginia; Amanda L. Riedel, United States Department of Justice, Washington, D.C., for Appellee.

Before WILLIAMS, Chief Judge, and MOTZ and KING, Circuit Judges.

Affirmed by published opinion. Judge KING wrote the opinion, in which Chief Judge WILLIAMS and Judge MOTZ joined.

OPINION

KING, Circuit Judge:

John Alvis Jackson, Jr. and Larry Andrew Carey (together, the "Defendants"), were prosecuted in the Western District of Virginia on multiple fraud and theft offenses involving a loss of more than $15 million. The Defendants were each convicted by a jury in early 2006 of the following offenses:

- two counts of bank fraud, in contravention of 18 U.S.C. § 1344 (the "bank fraud offenses");

- five counts of wire fraud, in violation of 18 U.S.C. § 1343 (the "wire fraud offenses");

- a single count of making false statements in documents required by the Employee Retirement Income Security Act of 1974 ("ERISA"), in contravention of 18 U.S.C. § 1027 (the "ERISA false statement offense");

- two counts of theft from an ERISA-covered pension plan, in violation of 18 U.S.C. § 664 (the "ERISA theft offenses"); and,

- a single count of theft from a health care benefit program, in contravention of 18 U.S.C. § 669 (the "health care program theft offense").

Jackson was also convicted of conspiracy to commit various federal offenses, in violation of 18 U.S.C. § 371 (the "conspiracy offense"). In late 2006, Jackson was sentenced to 108 months in prison and Carey was sentenced to 87 months. These consolidated appeals ensued.

On appeal, the Defendants present multiple contentions of error. First, they challenge their convictions on the ERISA theft offenses, raising the primary issue in this appeal: whether, pursuant to § 664 of Title 18, unpaid employer ERISA pension plan contributions constitute "assets" of the plan. Second, the Defendants contest the sufficiency of the evidence supporting certain of their convictions. Finally, they challenge their sentences on several grounds. As explained below, we reject their contentions and affirm.

I.

A.

On September 15, 2005, a grand jury in the Western District of Virginia returned an indictment against the Defendants, charging them with, inter alia, the bank fraud offenses (Counts One and Two), the wire fraud offenses (Counts Three through Seven), the ERISA false statement offense (Count Ten), the ERISA theft offenses *535 (Counts Eleven and Twelve), the health care program theft offense (Count Thirteen), and the conspiracy offense (Count Fourteen). FN1 The Defendants pleaded not guilty and were tried before a jury over an eleven-day period in February and March 2006.

FN1. The indictment alleged two other offenses-bank fraud, in violation of 18 U.S.C. § 1344 (Count Eight), and money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) (Count Nine)-and made a forfeiture allegation pursuant to 18 U.S.C. §§ 981(a)(1)(C), 982(a)(2) and (7) (Count Fifteen). Jackson and a third defendant, his daughter, were charged in Counts Eight and Nine. Jackson's daughter was never tried and the charges against her were dismissed. The prosecution dismissed Counts Eight and Nine against Jackson. Count Fifteen, the forfeiture allegation, was also dismissed.

The prosecution's trial evidence consisted primarily of extensive business records and the testimony of several fact and expert witnesses. Jackson testified on his own behalf, denied involvement in any criminal activity, and presented six witnesses in support of his defense. Carey presented expert testimony in his defense, but did not testify. The trial evidence is summarized below.FN2

FN2. The facts spelled out herein are drawn from the trial record. We recite the evidence in the light most favorable to the prosecution, as the prevailing party at trial. See United States v. Bursey, 416 F.3d 301, 304 n. 1 (4th Cir.2005).

1.

The Burruss Company, a wood products business involved in the manufacturing of flooring for tractor-trailers and residential homes, was headquartered in Galax, Virginia, with offices in Lynchburg, Virginia, and manufacturing plants in Virginia, Tennessee, and Kentucky. Jackson served as President and Chief Executive Officer of Burruss

from 1989 until October 2000. Carey began working for Burruss in 1976 and eventually became its Chief Financial Officer, a position he held until October 2000.

In 1991, investor Grant Minor Wilson and two others purchased Burruss. Wilson served as one of Burruss's directors from 1991 through 1994. In 1995, Wilson created Burruss Holding Company and exchanged his Burruss stock for the ownership of Burruss Holding (the "1995 refinance"). Burruss and Burruss Holding then retired the balance of Burruss's stock for approximately $14 million procured by loan from Fleet Capital, and issued a promissory note for $10 million to buy out the other Burruss shareholders. Burruss, as a result, became a wholly owned subsidiary of Burruss Holding. Wilson, by controlling Burruss Holding, became its primary representative and dealt directly with Jackson, Burruss's President and CEO, and Carey, its CFO.FN3

FN3. Burruss Holding sold part of its shares to other investors, reducing Wilson's direct ownership to about 45%. The shares of the other Burruss Holding investors were held in voting trusts, however, and Wilson had the right to vote those shares for ten years.

The 1995 refinance resulted in a loan agreement that Burruss negotiated with Fleet, dated April 7, 1995. In his newly acquired capacity, Wilson discussed the Fleet loan agreement extensively with Jackson and Carey. The loan agreement was asset-based, and Burruss collateralized the Fleet loan with its fixed-assets and working-capital. The fixed-assets portion of the Fleet loan was secured by Burruss's

real estate, machinery, and equipment, and was initially for $6 million. Between 1995 and 2000, the Fleet loan agreement was amended multiple times to increase Burruss's borrowing capacity under the fixed-assets portion of the loan. The balance of the fixed-assets portion of the loan, as of September 28, 2000, reached over $10 million. The second aspect of the Fleet loan related to Burruss's working-capital, and was secured by its accounts receivable and inventory. The working-capital portion comprised the "lion's share" of the loan, with the amount thereof varying from day-to-day. As of September 28, 2000, the principal of the working-capital part of the Fleet loan was over $25 million, and at other times it exceeded $31 million.

The terms of the Fleet loan agreement required that all of Burruss's assets be pledged as collateral. Consequently, any funds received by Burruss from selling its assets were to be paid to Fleet. Under the loan agreement, Burruss was entitled to sell only $25,000 worth of equipment annually without Fleet's approval. In addition to pledging Burruss's assets as collateral for the Fleet loan, a "support agreement" required its officers to operate and maintain Burruss in a manner that would properly support the Fleet loan, and to promptly inform Fleet of any fraud, conversion, or misapplication of Burruss's assets, or any breach of the loan agreement. Wilson, Jackson, and Carey executed support agreements with respect to the Fleet loan.

By 1996, Burruss began having problems paying its vendors in a timely fashion and was unable to maintain its inventory and raw materials. Several of Burruss's small vendors needed to be paid in a shorter time frame than the business could accommodate, and thus declined to sell supplies to it. Jackson discussed with Wilson the creation of an entity to purchase timber from small vendors and resell it to Burruss with an industry-standard markup, enabling Burruss to accumulate and maintain the inventory it needed. Soon thereafter, Jackson and his wife, along with Carey, formed a separate business called Virginia Wood Products ("VWP"). VWP served as a broker to secure timber for Burruss and provided it with sixty- to ninety-day payment terms. Burruss was then able to secure raw materials (primarily timber) through VWP from vendors who would no longer sell directly to Burruss.

The books and records of Burruss, however, revealed that many of the small vendors selling to VWP were also continuing to sell supplies to Burruss. Although VWP had no storage facilities and did not physically handle the timber it purchased for delivery to Burruss-and even though VWP's work was actually performed by Burruss employees-VWP marked-up the price of such timber by 5% to 8% before reselling it to Burruss. VWP did not typically pay its vendors any more expeditiously than Burruss did.

In addition to its inventory issues, Burruss had additional difficulties in 1996. One of its most profitable facilities was largely destroyed by fire, severely impacting Burruss's profits. In addition, a

Canadian company entered the tractor-trailer flooring business, competing with Burruss and severely reducing its most profitable component. Burruss recovered from those difficulties, however, and eventually became an even larger producer of residential flooring.

In 1998, Jackson asked Wilson for a salary increase and a bonus, explaining that he had not received either in some time. In response, Wilson raised Jackson's salary to $200,000 per year, plus a $50,000 yearly bonus. Wilson agreed that Jackson could draw his bonuses from a Burruss Holding account maintained at Wachovia Bank in Lynchburg (the "secret Wachovia account"), in order to conceal payment of the bonuses from other Burruss personnel. The secret Wachovia account was not referenced or listed in any of Burruss's records, and was thus concealed from Fleet.

3.

Between 1995 and 1999, the Fleet loan agreement was amended at least eight times to increase Burruss's borrowing limits. Under the working-capital portion of the loan agreement, Burruss had a borrowing base of 85% against its eligible accounts receivable, 70% against its raw materials, and 65% against its finished goods. In order to obtain an advance under the loan agreement, Burruss was obligated to submit a Borrowing Base Certificate ("BBC") to Fleet, on which it reported the current status of its inventory and eligible accounts receivable.FN4 Carey was primarily responsible for preparing the BBCs, and,

in doing so, compiled a list of Burruss's inventory and eligible accounts receivable-sometimes from inventory reports and sometimes by fabricating them. A Carey subordinate, Donna Elliott-Burruss's office manager and corporate secretary in Galax-actually completed the BBCs and transmitted them by fax to Fleet in North Carolina. In response, Fleet wired the advanced funds to a Burruss account at Wachovia in Lynchburg.FN5

FN4. "Inventory," for purposes of the BBCs, meant all of Burruss's raw materials and finished goods. "Eligible accounts receivable" meant all of Burruss's accounts receivable excluding invoices more than sixty days past due or ninety days beyond an original date.

FN5. The Burruss account at Wachovia Bank in Lynchburg was used as Burruss's primary operating account. It is separate and distinct from the secret Wachovia account maintained by Burruss Holding.

4.

As Burruss financially deteriorated throughout 1998, Jackson and Carey began inflating the company's assets on the BBCs they used to obtain advances under the Fleet loan. BBCs were inflated in several ways: (1) by falsely creating inventory from a closed plant; (2) by creating false invoices for goods that had not been sold; (3) by falsely overvaluing inventory; and (4) by altering the original dates of accounts receivable. In carrying out this asset inflation scheme, Jackson repeatedly instructed Carey to mischaracterize raw lumber as purchased goods, thereby inflating the BBCs. Jackson also suggested to Carey that such raw

lumber be characterized as finished product, thus increasing Burruss's borrowing power. At Carey's direction, Elliott faxed false inventory reports and inflated BBCs to Fleet on four occasions in September and October of 2000.FN6

FN6. The false inventory reports and inflated BBCs constitute the underpinnings of the wire fraud offenses (Counts Three through Seven).

In 1999 and 2000, Jackson sold nine pieces of Burruss's equipment, valued at a total of approximately $260,000, without notifying Fleet as required by the loan agreement. Although these assets were owned by Burruss and pledged to Fleet, the proceeds from the sales were deposited into the Burruss Holding secret Wachovia account. Carey largely used the secret Wachovia account for deposits of insurance receipts, tax refunds, and other funds representing assets of Burruss that had been pledged to Fleet. Neither Jackson, Carey, nor any other Burruss representative notified Fleet that its collateral had been sold, or that funds representing collateral under the Fleet loan agreement had been deposited in the secret Wachovia account. Jackson and Carey paid themselves from the secret Wachovia account the sums of approximately $514,000 and $230,000, respectively, between May 1998 and February 2000. Jackson also directed Carey to pay $68,000 to VWP from the secret Wachovia account, without any supporting invoices. During that same period, VWP was used to distribute substantial sums of money from Burruss to Jackson and Carey personally. Between 1997 and 2000, VWP paid Jackson over $473,000, and Carey over $530,000.

5.

During the relevant period, Burruss maintained three separate ERISA plans, for both pension and health purposes, that covered most of its 1200 to 1400 employees. First, Burruss maintained a pension plan for its non-union salaried employees (the "Company Plan"). Second, it maintained a pension plan for its unionized employees (the "Union Plan").FN7 Third, Burruss established and utilized a health care benefit program for its employees (the "Health Plan"). Each of these ERISA plans was used by the Defendants as a vehicle for carrying out offenses underlying these appeals. The relevant details of the three ERISA plans and their relationships to the various offenses are described further below.

FN7. The Union Plan was limited to unionized employees working at Burruss's plant in Alcoa, Tennessee. The contributions to that Plan were substantially less than those made to the Company Plan.

a.

Under the Company Plan, an account was maintained for each eligible participant, and the funds and moneys in each participant's account resulted from employer contributions made by Burruss. Burruss was obligated to contribute 3% of the aggregate annual compensation of all eligible participants to the Company Plan. The Company Plan obligated Burruss to provide each plan participant with an annual account statement, as of the last day of the calendar year. Pursuant to an

"Adoption Agreement" of 1994, the Company Plan required Burruss to allocate and credit the annual employer contributions to the proper participant accounts.FN8

FN8. The Company Plan and the Union Plan have separate Adoption Agreements, which establish the Plans and define the terms and conditions thereof.

The Union Plan required Burruss to establish a bookkeeping account for each eligible unionized employee, to pay into each account the participant's share of Burruss's annual Plan contributions, and to prepare annual participant statements after making the proper allocations for each Plan Year. The Union Plan defined the "valuation date" as the "last day of the Plan Year," and gave each participant a vested and nonforfeited interest in his plan account. J.A. 2872-74.FN9 The Adoption Agreement defined a Plan Year as twelve consecutive months ending December 31st, and it required Burruss to contribute fifteen cents to the account of each plan participant for each hour of service.

FN9. Citations herein to "J.A. ----" refer to the contents of the Joint Appendix filed by the parties in this appeal.

Burruss was designated as the Plan Administrator for the Company Plan and Carey served as Assistant to the Plan Administrator. Carey was designated as Plan Administrator for the Union Plan. Jackson and Carey both performed administrative duties for each of the Plans. Accordingly, Jackson signed the bargaining agreement with the union; and both Carey and Jackson signed the Plan contribution checks. The

Trustee for both Plans was Crestar Bank, which was later renamed SunTrust Bank. Each Plan Administrator possessed the "primary authority for filing the various reports, forms and returns with the Department of Labor and the Internal Revenue Service." J.A. 2788. For example, Carey, on behalf of the Company Plan, filed a Form 5500 Annual Return/Report of Employee Benefit Plan for Plan Year 1997 with the Department of Labor.

As of December 31, 1998, Burruss owed approximately $322,000 to the Company Plan for Plan Year 1998. Pursuant to IRS regulations, Burruss was entitled to defer its 1998 contribution until its federal income tax return was due on March 15, 1999, or, if it obtained a filing extension, until September 15, 1999. On October 15, 1999, Burruss filed its 1998 Form 5500 for the Company Plan with the Department of Labor, signed by Jackson. On the Form 5500, Jackson stated that Burruss owed $322,169 to the Company Plan and that it had made the Plan contribution in that amount. The Form's question 15(c) required that the sum of any funding deficiency be reported, and Jackson left the question blank. As of October 15, 1999, however, Burruss had made no contributions to the Company Plan for Plan Year 1998.

In early 2000, Frank Dishman, a pension account manager with Crestar Bank, met with Jackson and Carey concerning Burruss's ERISA plan obligations. According to Dishman, Jackson and Carey believed that "they did not have to make these [contributions], that they had discontinued making contributions to the plan." J.A. 1527-29. Dishman

advised them that Burruss could cease making its Plan contributions only by terminating the Plans according to law. Dishman also advised the Defendants that Burruss had not made its 1998 Company Plan contribution. In response, Carey falsely asserted that he had mailed the 1998 contributions for both Plans to Crestar in December 1999. Dishman, however, advised them that Crestar had not received any such payments.

Carey thereafter directed Elliott to falsely record, on Burruss's general ledger of March 29, 2000, that Burruss had sent a check to Crestar Bank on December 31, 1999, for the 1998 Company and Union Plan contributions. FN10 On April 14, 2000, Dishman again advised Carey by letter that Crestar had not received the 1998 Company Plan contribution. On April 18, 2000, however, the Trustee received a Burruss check dated December 20, 1999, signed by Jackson and Carey, for the 1998 Company and Union Plan contributions. When Dishman's successor from SunTrust Bank, Sybill Wolff, asked Carey about the late contributions, Carey asserted that he had given the check to Dishman earlier, who had probably lost it.

FN10. Contributions for the Company and Union Plans were overdue in early 2000 and Burruss assertedly combined its annual contributions into one check.

Burruss was obligated, for Plan Year 1999, to contribute over $324,000 to its Company and Union Plans. In 2000, Jackson and Carey separately observed in the company records that the 1999 contributions to the Plans were due by September 15, 2000, and Jackson mentioned the possibility of

terminating the Company Plan. Wolff met with Carey in mid-August 2000 and reminded him that the 1999 contributions to the Plans were due by September 15. As that date approached, Wolff repeatedly called Carey and advised him to make the 1999 contributions. Although Carey assured her that Burruss would make those contributions, it never did. Wolff thereafter called Carey several times concerning the missed payments. Carey avoided most of those calls. When he did respond, he simply asserted that a mistake must have been made. Wolff also called Jackson, who directed her to speak to Carey about the problem. On October 18, 2000, Wolff advised Carey by letter that Burruss had not made its 1999 contributions to the Company and Union Plans, and that Burruss could be penalized for not making them.

In early September 2000, SunTrust Bank sent Burruss the 1999 individual account statements for the participants of both Plans. Each statement reflected a participant's account balance for the Plan Year ending December 31, 1999, reflecting Burruss's contribution for that Plan Year. SunTrust later advised the participants of both Plans that, although it had mistakenly credited their accounts with accrued benefits for the 1999 Plan Year, an "earnings reversal" had been made because Burruss "failed to submit the required contribution for the 1999 Plan Year." J.A. 722-30. SunTrust also informed the participants that "[s]ince the statement you received last year included an accrual for that contribution, an adjustment has been made on the enclosed statement to reflect the fact that no contribution was received." Id.

b.

As mentioned above, Burruss also maintained an ERISA Health Plan for its employees, and contracted with the Piedmont Community Health Plan ("PCHP") to process health care claims. Jackson signed the PCHP contract on behalf of Burruss, and Carey administered the Health Plan in conjunction with Jacqueline Mosby, PCHP's controller. In order to finance the Plan, Burruss made weekly withholdings from its employees' earnings for contributions to the Health Plan.

In 2000, Burruss began paying PCHP only part of its employee withholdings for the Health Plan, resulting in a $698,000 deficiency by June of that year. On August 1, 2000, Burruss failed to pay PCHP more than $109,000, even though those moneys and funds had been withheld from its employees' earnings for health care contributions. By early October 2000, PCHP had ceased paying health care claims under the Health Plan, resulting in substantial unpaid medical expenses for the covered Burruss employees.FN11

FN11. As a result of PCHP's failure to pay health care claims for Burruss's employees, the affected employees became personally liable for their medical expenses. Ironically, Jackson was forced to pay over $36,000 for his own heart surgery in October 2000.

6.

In June of 2000, Jackson and Carey hired Ray Equi to oversee Burruss's reporting to Fleet on the BBCs. Equi promptly discovered that Burruss's inventory and accounts receivable had been overstated on the BBCs and, in August 2000, he prepared and directed memoranda to that effect to both Jackson and Carey. Equi also refused to sign any inflated BBCs. On August 17, 2000, Equi advised Jackson that Burruss's inventory and accounts receivable were being overstated, that Burruss was close to its lending limits on the Fleet loan, and that much of its inventory and accounts receivable were not loan-eligible. In August 2000, Carey fired Equi, who later served as a key witness for the prosecution.FN12

FN12. Other important witnesses for the prosecution included Grant Wilson, who controlled Burruss Holding; Donna Elliott, the corporate secretary; and Frank Dishman, of Crestar (SunTrust), the Trustee of the Company and Union Plans.

On October 18, 2000, Wilson and Carey flew to Atlanta for a meeting with Fleet. During the trip, Carey advised Wilson that Burruss was suffering from inventory shortages and, after the meeting, Wilson travelled to Galax to examine Burruss's finances. After examining Burruss's records, Wilson ascertained that it had overstated its assets on the BBCs submitted to Fleet by more than $11 million, and that Burruss was in serious financial trouble.

On October 24, 2000, Wilson hired Kevin O'Halloran, a crisis manager from Newbridge Management LLC, to operate Burruss. O'Halloran and Ralph Brotherton, a CPA, then conducted an extensive review of Burruss's records. They

interviewed Carey repeatedly, seeking to ascertain Burruss's true financial condition. Carey admitted that he had intentionally inflated the BBCs submitted to Fleet in order to obtain working capital for Burruss and to make the business more attractive to potential buyers. Carey also acknowledged that he had deposited Burruss's insurance receipts, tax refunds, and other funds into the secret Wachovia account. Carey asserted that he had not made the 1998 and 1999 ERISA contributions to the Company and Union Plans because there were more pressing expenses due. Carey explained that Burruss's financial problems should be resolved after being sold, and that he expected a personal financial benefit from the sale.FN13 Significantly, O'Halloran and Brotherton testified against the Defendants at trial. Unfortunately, all efforts to sell Burruss failed. Ascertaining that it had no other option, Burruss declared bankruptcy on November 7, 2000.

FN13. Wilson made unsuccessful efforts to sell Burruss in 1999 and 2000.

B.

At the conclusion of the prosecution's case-in-chief, and again at the conclusion of the trial evidence, the Defendants moved for judgments of acquittal. See Fed.R.Crim.P. 29(a) (authorizing motion for judgment of acquittal after conclusion of prosecution's case-in-chief and again at conclusion of all evidence). The court denied these acquittal motions, however, and the jury found Jackson guilty

on all charges, and Carey guilty on all charges except the conspiracy offense.

In post-trial proceedings, Jackson and Carey renewed their motions for judgments of acquittal and also sought, in the alternative, a new trial. See Fed.R.Crim.P. 29(a) and 33. The district court denied those requests, explaining its rulings in a Memorandum Opinion filed on June 7, 2006 (the "Opinion").FN14 The Opinion's bases for these rulings, specifying that the various convictions were amply supported by the evidence and that there was no sound reason for awarding the Defendants a new trial, included the following:

FN14. The district court's Opinion is found at J.A. 2464-81.

• On the bank fraud and wire fraud offenses, the evidence was sufficient to support Jackson's convictions because he oversaw the daily operations of Burruss, was Carey's superior, was familiar with the borrowing arrangement with Fleet, had directed Carey to inflate inventory, had instructed Elliott to overvalue inventory to increase Burruss's borrowing power, and had been advised by Equi that the accounts receivable were inflated. See Opinion 3-4.
• On the wire fraud offenses, the evidence supported Jackson's convictions because he "knew of and approved previous faxes to Fleet, and could foresee that the inflated [BBCs] would continue to be faxed." Id. at 5.

• On the bank fraud offenses, the court observed that, although "a bank must be the intended victim of a bank fraud scheme, it need not be the immediate

victim." Id. at 7. Here Burruss was a victim of the fraud scheme, but "Fleet suffered the ultimate risk of loss." Id.

• On the ERISA false statement offense, the evidence was sufficient to sustain Jackson's conviction because company policy required him to sign checks above a certain sum, and he had not sought to correct the 1998 Form 5500 (although he knew that a 1998 Plan contribution had not been made). Id. at 8.

• The evidence was sufficient to support Carey's conviction on the false statement offense in Count Ten, in that he was a co-signer on company checks and had created false accounting entries to cover-up nonpayment of the 1998 ERISA contributions. Id. at 8-9.

• On the ERISA theft offenses, the employer contributions to ERISA pension funds became assets of the ERISA plans when they became due and payable. The Defendants were not required to be fiduciaries of the Plans because 18 U.S.C. § 664 prohibits "any person" from committing a § 664 offense, and makes no reference to fiduciary status. Id. at 10-12.

• Jackson was not entitled to judgment of acquittal on the ERISA theft offenses because the "handwriting from his planner and notepads indicat[ed] that he knew the pension contributions were due," demonstrating his "reckless disregard for the interest of the pension plans." Id. at 12.

• On the health care program theft offense, the government, by "showing that funds were withheld from employee paychecks for contribution to the healthcare plan," presented sufficient evidence to sustain the Defendants' convictions. Id. at 13-14.

• On the conspiracy offense, the evidence was sufficient to establish that Jackson had conspired with Elliot in inflating the BBCs. Id. at 15.

• Finally, the Defendants' were not entitled to a new trial, because the evidence was sufficient to sustain their convictions and because they were not prejudiced by the improper exclusion or admission of evidence. Id. at 16-17.

C.

The presentence investigation reports (the "PSRs") for Jackson and Carey calculated their advisory sentencing ranges under the 2000 edition of the Sentencing Guidelines. The PSRs grouped their offenses and awarded them base offense levels of 4, see USSG § 2B1.1(a), to which they added the following: two-level increases because the grouped offenses involved more than minimal planning, id. § 2B1.1(b)(4)(A); four-level increases for substantially jeopardizing the safety and soundness of a financial institution, id. § 2B1.1(b)(6)(A); two-level increases for embezzling from ERISA plans while serving as plan fiduciaries, id. § 3B1.3; and seventeen-level increases because the loss exceeded $10 million, id. § 2B1.1(b)(1)(R). Jackson's PSR also recommended a two-level increase because he committed perjury

while testifying at trial. Id. § 3C1.1. Premised on criminal history categories of I, Jackson's total offense level was 31 and his advisory sentencing range was 108 to 135 months, and Carey's total offense level was 29 and his advisory sentencing range was 87 to 108 months.

The district court conducted Jackson and Carey's sentencing hearings on January 3, 2007, and, after largely accepting the PSRs' recommendations, the court denied the prosecution's motion for role-in-the-offense enhancements against Jackson and Carey. Importantly, the court also ruled that the PSRs' recommended seventeen-level increases for causing a loss exceeding $10 million were applicable. The Defendants objected to this ruling, contending that the loss calculations made in the PSRs were incorrect. They asserted that the loss calculations should reflect only the actual and foreseeable loss, which was less than $10 million. They also claimed that Burruss and its assets had been overvalued from the beginning and that the loss suffered by Fleet was due to Burruss's unforeseeable decision to file for bankruptcy. The court rejected these contentions and, after weighing the evidence, the advisory Guidelines ranges, and the 18 U.S.C. § 3553(a) sentencing factors, sentenced Jackson and Carey at the bottom of their advisory ranges: 108 and 87 months, respectively. The Defendants thereafter filed these appeals, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

In their consolidated appeals, the Defendants first contend that they cannot be subjected to criminal liability under § 664 of Title 18 for the two ERISA theft offenses. Additionally, they contest the sufficiency of the evidence to support certain of their convictions. We address these contentions in turn.

FN15. The Defendants have also raised challenges to their sentences, which are disposed of in Part III hereof.

A.

With respect to their convictions on the ERISA theft offenses in Counts Eleven and Twelve, the Defendants contend that the district court erred when it ruled that unpaid employer contributions to the Company and Union Plans constituted "assets" of the Plans under 18 U.S.C. § 664.FN16 Specifically, they assert that their convictions on the ERISA theft offenses must be vacated, as a matter of law, because "unpaid employer contributions are not assets of a plan until they are paid into the plan unless the plan documents specifically state otherwise." Br. of Appellants 28-29. Because the Plan documents fail to specify that unpaid employer contributions constitute plan assets, the Defendants maintain that they cannot be guilty of the ERISA theft offenses. They further contend that, even if the unpaid ERISA contributions were assets of the Company and Union Plans, they cannot be guilty because they were never fiduciaries of the Plans.

FN16. The primary issue in this appeal relates to whether, under 18 U.S.C. § 664, unpaid employer ERISA pension plan contributions constitute "assets" of the plan. Section 664

provides, in relevant part, that[a]ny person who embezzles ... or unlawfully and willfully ... converts to his own use ... any of the moneys, funds ... or other assets of any [ERISA plan] shall be fined ... or imprisoned ... or both.

The ERISA theft offenses relate specifically to the Company and Union Plans. Count Eleven of the indictment, alleges, in pertinent part, as follows:That between on or about January 1, 1999 and on or about March 15, 2000, in the Western District of Virginia, the [D]efendants, ... while fiduciaries of the Company Plan, did embezzle, steal and unlawfully and willfully abstract and convert to their own use, and to the use of others, an amount not less than $318,246.27, which constitutes moneys, funds, securities, premiums, credits, property and other assets of the Company Plan, an employee pension benefit plan subject to [ERISA]. J.A. 59-60. Count Twelve, in operative language that is identical to that in Count Eleven, relates to the conversion of the moneys and funds of the Union Plan.

Relying primarily on the Second Circuit's opinion in United States v. LaBarbara, 129 F.3d 81 (2d Cir.1997), the district court ruled that unpaid employer contributions become "credits" and are ERISA "plan assets" when they are "due and payable to the plan." Opinion 9-11. The court deemed irrelevant the Defendants' claim that they had never served as fiduciariesof the Plans, because § 664 explicitly applies to "any person" who steals or embezzles the moneys, funds, or assets of an ERISA plan. We review de novo a ruling by a district court on an issue of statutory interpretation. United States v. Green, 436 F.3d 449, 456 (4th Cir.2006);

see also LaBarbara, 129 F.3d at 86, 88 (reviewing de novo district court's interpretation of statutory term "assets" under § 664).

1.

In order to prove the ERISA theft offenses, the prosecution was obligated to establish the elements of § 664, i.e., that Jackson and Carey (1) committed acts of embezzlement or conversion; (2) that such acts of embezzlement or conversion involved the moneys, funds, or assets of an ERISA plan; and (3) that such acts were committed with the specific intent of depriving the ERISA plan of its moneys, funds, or assets. See 18 U.S.C. § 664; see also United States v. Whiting, 471 F.3d 792, 800-01 (7th Cir.2006) (observing that § 664 is violated when any person willfully or intentionally converts ERISA funds to his own use or use of another); United States v. Krimsky, 230 F.3d 855, 860 (6th Cir.2000) (observing that, for conviction under § 664, prosecution must prove accused embezzled or converted funds, moneys, or assets of ERISA plan with specific intent of depriving plan of such moneys, funds, or assets).FN17 Although § 664 does not explicitly provide that unpaid employer contributions constitute ERISA plan assets, § 1103 of Title 29 specifies that such assets are held in trust, and not for the employer's benefit. The Second Circuit concluded that, when an ERISA employer has paid wages or salaries to its employees, it is contractually bound to contribute to any ERISA plan that it maintains. In its LaBarbara decision, the court decided that an employer must comply with its contractual obligations to make contributions to its

ERISA plan, and that such a contractual obligation constitutes an "asset" of the ERISA plan. See 129 F.3d at 88; see also In re Luna, 406 F.3d 1192, 1198-1201 (10th Cir.2005) (holding that contractual right to collect unpaid contributions is plan asset).

FN17. On Counts Eleven and Twelve, the district court instructed the jury, in a manner consistent with the foregoing authorities, as follows:Elements which must be proved beyond a reasonable doubt before a defendant may be found guilty under [§ 664] proscribing embezzlement are ... [one,] the defendant fraudulently and willfully embezzled, stole, or converted property, money or funds to his own use or the use of another; [two,] the property, money, or funds taken belonged to an employee benefit plan subject to ERISA; [and three,] the defendant acted with the intent to deprive the pension plan of its funds, with reckless disregard for the interests of the pension plan.

J.A. 2220-21.

Notwithstanding the Defendants' assertions that Burruss's unpaid employer contributions did not constitute assets of the Company and Union Plans for purposes of the ERISA theft offenses, the relevant facts and legal principles support the district court's ruling. When Burruss established its ERISA pension plans, it bound itself to the terms thereof. Both Plans mandated annual contributions based upon hours worked, and wages and salaries paid. Burruss could properly extricate itself from those ERISA obligations only by proper termination of the Plans. See 29 U.S.C. § 1103. We thus agree with the district court and the Second Circuit, and are satisfied that Burruss's unpaid contributions to the Plans constituted the "moneys, funds, or assets"

thereof for purposes of § 664. As a result, the Defendants' contention in that regard must be rejected.

2.

The Defendants also contend that, even if the unpaid ERISA contributions were assets of the Company and Union Plans, they nevertheless cannot be guilty of the ERISA theft offenses because they were never fiduciaries of the Plans. The Defendants assert that, in order for them to be criminally liable under § 664, the prosecution had to prove that they were such fiduciaries. See Luna, 406 F.3d at 1198, 1201 (observing that for defendant in civil ERISA fraud action to be personally liable, he must be fiduciary of ERISA plan). Indeed, as they point out, Counts Eleven and Twelve actually allege that the Defendants were fiduciaries. See J.A. 59-61 (alleging that Defendants, "while fiduciaries" of the Plans, embezzled and converted moneys, funds, and assets of Plans).

The district court ruled against the Defendants on this point, however, because § 664 plainly applies to "any person" who steals or embezzles the moneys, funds, or assets of an ERISA Plan. Opinion 11-12. Importantly, the court's instructions to the jury were consistent with § 664, and did not mandate a jury finding that either Jackson or Carey were fiduciaries. Counts Eleven and Twelve, in alleging that the Defendants were fiduciaries of the Plans, were thus at odds with the express terms of § 664. Such surplusage does not constitute appellate error, however, for at least three

reasons. First, the Defendants did not pursue a variance or surplusage claim in the district court or on appeal.FN18 Second, § 664 does not require that an accused be a fiduciary, but is plainly drawn in terms of "any person."

FN18. Because the Defendants have not raised a variance or surplusage claim on appeal, any such claim has been waived. See Fed. R.App. P. 28(a)(9)(A) (requiring appellant's brief to contain contentions and reasons for them, with citations to authorities and parts of record relied on); United States v. Al-Hamdi, 356 F.3d 564, 571 n. 8 (4th Cir.2004) (observing that contentions not raised in opening brief are waived). Even if the Defendants had raised such a claim, however, it would not alter the result here, because the fiduciary allegations of the ERISA theft offenses were merely surplusage and not error. See Ford v. United States, 273 U.S. 593, 602, 47 S.Ct. 531, 71 L.Ed. 793 (1927) (holding that allegations of indictment unnecessary to and independent of essential allegations may be ignored).

Finally, in these circumstances, the Defendants were shown to be fiduciaries of the Plans. Under ERISA, a "fiduciary" is a person who "exercises any authority or control respecting management or disposition of its assets, ... or discretionary responsibility" with respect to an ERISA plan. 29 U.S.C. § 1002(21)(A). ERISA also provides that an "administrator" is an example of a fiduciary. Id. § 1002(14)(A). ERISA defines an "administrator" as "the person specifically so designated by the terms of the instrument under which the plan is operated." Id. § 1002(16)(A)(i).

The Defendants contend that SunTrust, rather than either of them, was the Plan Administrator of the Company and Union Plans. Carey, however, was expressly named as Plan

Administrator in the Union Plan's documents, and as Assistant Plan Administrator in the Company Plan documents. Furthermore, in Phelps v. C.T. Enters., Inc., 394 F.3d 213, 221 (4th Cir.2005), we observed that, even though an officer of a business is not a named fiduciary of an ERISA plan, he is nevertheless a fiduciary when he assumes plan responsibilities or exercises control over whether to pay plan contributions. Jackson, as Burruss's CEO, was thus a fiduciary of the Company and Union Plans, because he assumed Plan responsibilities and exercised control over whether Burruss made its ERISA plan contributions. Under the undisputed facts, both Jackson and Carey performed administrative duties associated with the Plans: (1) Jackson signed Form 5500 as Plan Administrator and sponsor for Plan Year 1998; (2) Carey signed the Form 5500 as Plan Administrator for Plan Year 1997; (3) Jackson signed the collective bargaining agreement with the union; and (4) both Carey and Jackson signed the ERISA plan contribution checks. FN19

FN19. The Defendants argue that the Tenth Circuit's decision in Luna supports their position on appeal, and that their convictions on the ERISA theft offenses cannot stand because they were not "acting" as fiduciaries when they diverted the Plans' assets to their own use. See Luna, 406 F.3d at 1203-04 (observing that employers who exercise neither control nor authority over ERISA plan assets are not fiduciaries of plan). The Defendants' reliance on Luna is misplaced, however, because it is not controlling precedent and is factually distinguishable.

B.

The defendants next challenge the sufficiency of the evidence in support of certain of their convictions-both defendants challenge the evidence on a bank fraud offense (Count Two); Jackson challenges the evidence on the other bank fraud offense (Count One), as well as on each of the wire fraud offenses (Counts Three through Seven); and Carey challenges the evidence on the ERISA false statement offense (Count Ten). Under our precedent, an appellate review of a sufficiency issue is only to assess "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Young, 248 F.3d 260, 273 (4th Cir.2001). We have applied this settled legal principle and carefully assessed the trial record on the sufficiency of evidence contentions, as summarized in the Opinion. See supra Part I.B. Premised on this assessment, we agree with the district court's analysis of the evidence sufficiency contentions, as spelled out in its Opinion and summarized herein. We therefore affirm its rejection of the Defendants' evidence sufficiency challenges.

III.

The Defendants also challenge their sentences on several grounds. Most compellingly, they contend that the district court erred in setting their offense levels under the Sentencing Guidelines by (1) miscalculating the applicable fraud-loss amount, and (2) penalizing them for substantially jeopardizing the safety and soundness of a financial institution. We assess these issues in turn.

A.

First, the Defendants contend that the district court miscalculated the fraud-loss amount under section 2B1.1(b) of the Guidelines, which erroneously resulted in a seventeen-level increase to their offense levels. The Defendants seek to limit the amount of loss used for sentencing purposes to what was, in their view, reasonably foreseeable. FN20 We review de novo a district court's interpretation of what constitutes a "loss" under the Guidelines, while accepting its loss calculation in the absence of clear error. United States v. Allen, 491 F.3d 178, 193 (4th Cir.2007). Pursuant to section 2B1.1 cmt. n. 2, "loss" is the value of the property taken, damaged, or destroyed. In calculating loss, section 2B1.1 cmt. n. 3 provides, in pertinent part, that "the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information." Here, the court determined that the PSRs had accurately calculated the applicable loss to be greater than $10 million.

FN20. The Defendants derive this foreseeability language from commentary to the 2005 edition of the Guidelines, defining "actual loss" as "the reasonably foreseeable pecuniary harm that resulted from the offense." USSG § 2B1.1 cmt. n. 3 (2005). The Defendants have, however, erroneously relied on the 2005 edition of the Guidelines. The PSRs calculated the Defendants' recommended sentences based on the 2000 edition, and the district court largely adopted the PSRs' recommendations. Although we review the Defendants' sentences under the 2000 edition, which does not contain this same language, we nevertheless consider the Defendants' foreseeability contention and find it unpersuasive.

The Defendants contend, however, that the extent of the loss resulting from their offenses was largely unforeseeable. Their primary basis for this contention is that the loss suffered by Fleet was unforeseeable because it was actually caused by Burruss's decision to file bankruptcy.FN21 In contrast, the prosecution contends that Burruss's bankruptcy and Fleet's loss were foreseeable because the Defendants' criminal activities drove Burruss into bankruptcy and deprived Fleet of its collateral.

FN21. Jackson was hospitalized on October 12, 2000, and had open-heart surgery on October 13, 2000. During his hospitalization and recuperation, Wilson discovered that Burruss's assets had been inflated and hired O'Halloran to run the company. Incredibly, the Defendants contend that Jackson's absence also led to unforeseeable losses to Fleet.

We are unable to accept the Defendants' assertion that Burruss's decision to file for bankruptcy resulted in an unforeseeable loss. As the jury found, it was the Defendants' criminal activities and their mismanagement of Burruss that drove Burruss into bankruptcy and deprived Fleet of its collateral. As a result, the district court did not err in its findings on the fraud-loss amount.

B.

Next, the Defendants contend that the district court erred in increasing their offense levels, pursuant to section 2B1.1(b)(6)(A) of the Guidelines, on the premise that they substantially jeopardized the safety and soundness of a financial institution (namely, the Company, Union, and Health Plans). They argue, in this regard, that Burruss did not

qualify as a "large corporation" under the Guidelines; the ERISA plans in question were not terminated by Jackson's actions, but rather by the new Plan Administrators; and that the Plans were not jeopardized because, as a result of a settlement in a related civil suit, Jackson surrendered his individual account to reimburse the Plans. The prosecution contends that the Defendants' "large corporation" argument is undercut by the $1.4 million loss suffered by the ERISA Plans, plus the fact that the Plans were jeopardized when the Defendants stole their assets in 1999 to 2000. Finally, the prosecution contends that the Defendants' argument that they did not terminate the Plans lacks merit because their criminal activities forced Burruss into bankruptcy, thus causing the terminations.

The Defendants present no authority to support their claim that Burruss did not qualify as a "large corporation." The Defendants derive their "large corporation" assertion from Guidelines section 2B1.1 cmt. n. 8, which provides, in pertinent part:

"Union or employee pension fund" and "any health, medical, or hospital insurance association," as used [in defining a financial institution], primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

Unfortunately for the Defendants, the evidence satisfies this Guidelines provision. The Funds in this case served over half of Burruss's 1200 to 1400 employees and operated in multiple states, providing medical and retirement benefits to both union and non-union employees. And, the moneys and assets the Defendants embezzled from the Plans amounted to approximately $1.4 million over a two-year period. Finally, the Guidelines do not specify the "size" that a corporation must be before its ERISA plan qualifies as a "financial institution."

The Defendants' contention that the Plans were not jeopardized because Jackson reimbursed them also lacks merit. The Plans were jeopardized when moneys belonging to them were diverted for the Defendants' self-enrichment. Finally, it is not necessary to the application of this enhancement that the Plans be terminated: it is only necessary that the Plans be placed in "jeopardy" of termination. See USSG § 2B1.1 cmt. n. 9.FN22 The Plans were, in any event, ultimately terminated because of the Defendants' criminal activities-which drove Burruss into deep financial difficulty and ultimately resulted in its bankruptcy. Consequently, the sentencing court did not err in finding that the Defendants substantially jeopardized the safety and soundness of a financial institution.FN23

FN22. According to the Guidelines,[a]n offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so

depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

USSG § 2B1.1 cmt. n. 9 (emphasis added).

FN23. We are content to summarily reject the Defendants' other sentencing contentions. First, the Defendants assert that the Sentencing Guidelines are unconstitutional because sentencing enhancements may be imposed on the basis of non-jury factual findings, and mitigating character evidence does not reduce a defendant's Guidelines sentence. The Supreme Court has determined however, that the Sixth Amendment is not violated by an advisory Guidelines regime. See United States v. Booker, 543 U.S. 220, 233, 265, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). In any event, the district court properly considered mitigating character evidence, albeit with respect to the 18 U.S.C. § 3553(a) factors, rather than the Guidelines. Finally, the Defendants maintain that the district court erroneously applied a "presumption of reasonableness" to sentences within the applicable Guidelines ranges. Although the Defendants are correct that a district court is not entitled to apply such a presumption, see United States v. Battle, 499 F.3d 315, 322 (4th Cir.2007), there is no indication that the district court did so in this case.

IV.

Pursuant to the foregoing, we affirm Jackson's and Carey's convictions and sentences.

AFFIRMED

States District Court,
W.D. Virginia.
UNITED STATES OF AMERICA,
v.
John Alvis JACKSON, Jr. Larry Andrew Carey,
Defendants.
No. 6:04CR70118.
June 7, 2006.

Anthony Franklin Anderson, Anthony F. Anderson Law Offices, Roanoke, VA, Joseph Abraham Sanzone, Sanzone & Baker, P.C., Lynchburg, VA, for Defendants.

Jennie L. M. Waering, United States Attorneys Office, Roanoke, VA, for Plaintiff.

MEMORANDUM OPINION

MOON, J.

This matter is before the Court on Defendant John Alvis Jackson, Jr.'s motion for judgment of acquittal and for new trial, filed on April 3, 2006 and Defendant Larry Andrew Carey's motion for judgment of acquittal or arrest of judgment,[FN1] filed on April 3, 2006. For the following reasons, these motions shall be denied.

FN1. Although Defendant Carey styles his motion "Post-Trial Motion for Judgment of Acquittal or Arrest of Judgment," he states in the first sentence that he is renewing his motion for acquittal under Rule 29 and makes no further mention of arrest of judgment. Under Rule 34, the court must arrest judgment where the indictment does not charge an offense or

the court does not have jurisdiction over the charged offense. Fed.R.Crim.P. 34. As Carey's motion does not argue for arrest of judgment or suggest that either of these requirements applies, the Court will treat his motion only as a motion for judgment of acquittal under Rule 29.

Background

Defendants John Alvis Jackson ("Jackson") and Larry Andrew Carey ("Carey") were convicted under 18 U.S.C. §§ 1344, 1343, 1027, 664, 669, 2, and, in Jackson's case, 371 after a multi-week jury trial. The convictions stem from the fall of The Burruss Company ("Burruss"), which manufactured and sold wood flooring, cabinet components, and lumber products. The defendants, the company's principal officers, were convicted of falsely inflating the company's inventory on certificates supporting Burruss' revolving line of credit with Fleet Bank; as a result, Burruss received loans to which it was not entitled and for which there was no collateral. In addition, the defendants were convicted of converting company assets pledged as collateral to Fleet, making a false statement on Internal Revenue Service Form 5500 by stating that the company's contribution to the employee pension plan had been paid when it had not, and converting the assets of the employee pension and benefit plans. Defendant Jackson was also convicted of conspiracy to engage in these activities.

Jackson now moves for acquittal under Rule 29 and a new trial under Rule 33. Carey also moves for acquittal under Rule 29.

Standard of Review

Federal Rule of Criminal Procedure 29 provides that the court may order acquittal where the evidence is insufficient to support a guilty verdict. If the evidence presented, taken in the light most favorable to the prosecution together with all reasonable inferences, permits any rational trier of facts to find a defendant guilty beyond a reasonable doubt, then the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir.1982); *United States v. Olbres*, 61 F.3d 967, 970 (1st Cir.1995). The court must consider both direct and circumstantial evidence and allow the jury to determine the weight of the evidence and the credibility of witnesses, *Tresvant*, 677 F.2d at 1021. The uncorroborated testimony of a single witness is sufficient to sustain a conviction. *United States v. Wilson*, 115 F.3d 1185, 1190 (4th Cir.1997).

Federal Rule 33 provides that the court may order a new trial if the interest of justice so requires. The court's authority is broader under Rule 33 than under Rule 29, and it may weigh evidence and evaluate the credibility of witnesses in determining whether to grant a new trial. *United States v. Indelicato*, 611 F.2d 376, 387 (1st Cit.1979). Whether to grant a new trial lies within the sound discretion of the district judge. *United States v. Wechsler*, 406 F.2d 1032, 1033 (4th Cir.1966). The remedy of new trial is to be used sparingly, however, and only where the evidence weighs so heavily against the verdict that it would be unjust to enter judgment,

U.S. v. Arrington, 757 F.2d 1484, 1485-86 (4th Cir.1985); *U.S. v. Lewis*, 220 F.Supp.2d 548, 559 (S.D.W.Va.2002), or where a trial error of sufficient magnitude to require reversal on appeal occurred. *United States v. Ringwalt*, 213 F.Supp.2d 499, 508 (E.D.Pa.2002) (citing 3 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 556 (3d ed.2004)).

Discussion

Rule 29 Motion for Judgment of Acquittal

Counts One and Three through Seven

Count One of the indictment charged Jackson and Carey with bank fraud in violation of 18 U.S.C. §§ 1344 and 2 for inflating the value of the borrowing base certificates used to support The Burruss Company's revolving line of credit with Fleet Bank. The jury found both Jackson and Carey guilty of this count.

Jackson argues that in order to prove bank fraud, the government must prove that he acted knowingly and with an intent to defraud. The government failed to introduce evidence that he had such intent, he argues, because there was no evidence that he knew that the borrowing base certificates were inflated. He did not sign the certificates, and he testified that he did not know they were inflated until Burruss filed for bankruptcy.

Counts Three through Seven charged Jackson and Carey with wire fraud in violation of 18 U.S.C. §§ 1343 and 2, based on their transmittal of the borrowing base certificates to Fleet Bank. Both Jackson and Carey were convicted on these counts. Jackson argues that because the government presented no evidence showing that he knew the certificates were inflated, there is also insufficient evidence to convict him on these counts. He further argues that he was in the hospital undergoing heart surgery when the certificates referenced in Counts Six and Seven were faxed, and hence he cannot be held responsible for these transmittals.

Carey offers no objections to the jury's verdict as to Counts One and Three through Seven

In response, the government argues that sufficient evidence supports Jackson's conviction on Counts One and Three through Seven: Jackson oversaw the daily operations of Burruss, was Carey's superior, and was familiar with the borrowing arrangement at Fleet. The jury also had before it a note Jackson had written directing Carey to inflate the value of certain inventory, as well as the testimony of both Donna Elliot, who said Jackson instructed her and Carey to revalue some inventory items to increase the company's borrowing power, and Ray Equi, who had notified Jackson that the accounts receivable numbers were inflated. Finally, Jackson was aware that Burruss facilities were actually running low on inventory, despite the rising inventory numbers.

Given the evidence presented and drawing all reasonable inferences in the government's favor, sufficient evidence of Jackson's knowledge and intent exists to support a guilty verdict on these counts under Rule 29. Although the evidence of Jackson's intent is circumstantial, that does not detract from its weigh. The fact that Ray Equi notified Jackson of the inflated numbers, Jackson took no action in response, and Equi was subsequently fired, when coupled with Jackson's instructions to Carey and Elliot to revalue certain inventory, supports the inference that Jackson knew the borrowing base certificates were falsely inflated and intended to defraud Fleet Bank.

Jackson also argues that he is entitled to acquittal on Counts Six and Seven because he was in the hospital when the faxes described in those counts were sent and thus he cannot be held responsible for them. The wire fraud statute prohibits not only sending a fraudulent wire communication, but also causing one to be sent. 18 U.S.C. § 1343. The defendant himself need not have sent the communication if he caused the communication to be made, *United States v. Bohr*, 581 F.2d 1294, 1303 (8th Cir.1978), or if he knew of past wire communications and could foresee that the charged communication would be sent. *United States v. Gill*, 909 F.2d 274, 278 (7th Cir.1990). The evidence supports that Jackson knew of and approved previous faxes to Fleet, and could foresee that the inflated borrowing base certificates would continue to be faxed during his convalescence. Taken as a whole, then, the evidence is legally sufficient to sustain a verdict on these counts.

Count Two

Count Two charged Jackson and Carey with committing bank fraud in violation of 18 U.S.C. §§ 1344 and 2 by depositing the proceeds from equipment sales, tax refunds, and insurance proceeds into an account in the name of Burruss Holdings, the contents of which were not available to The Burruss Company and did not appear on its books, and using those funds to pay themselves bonuses. The jury found both Jackson and Carey guilty of Count Two.

Jackson argues that, although all of Burruss' assets were pledged to Fleet Bank as collateral, the sale of these assets amounts to no more than a breach of contract. A breach of contract does not rise to the level of fraud, he argues. Neither does the use of The Burruss Company's funds to pay bonuses amount to fraud, because there was no provision in the loan agreement preventing those bonuses, and Jackson was entitled to grant them. Further, he argues that the act of placing the funds in the Burruss Holdings account does not transform the transaction into a scheme to defraud. Grant Wilson was aware that bonuses would be paid out of the Burruss Holdings account, and indeed The Burruss Company owed a large debt to Burruss Holdings; the tax refunds deposited into the Burruss Holdings account were to assist in paying that debt.

Jackson also argues, in a footnote, that even if the transfers of funds to the Burruss Holdings account was improper, the injured entity was The

Burruss Company, not Fleet Bank. *See* *United States v. Brandon*, 298 F.3d 307 (4th Cir.2002) (holding that to be convicted of bank fraud, a defendant must actually intend to defraud a bank, rather than injuring it incidentally while defrauding another).

Carey raises no argument for acquittal as to Count Two.

As the government notes, ample evidence at trial showed that Jackson sold assets that he knew belonged to The Burruss Company and that were listed as collateral pledged to Fleet. He and Carey deposited the proceeds of these sales in the Burruss Holdings account and used funds from that account to pay themselves bonuses. Fleet Bank was unaware of this account, and the funds it contained did not appear on The Burruss Company books. The government's expert testified that even if The Burruss Company owed Burruss Holdings money, the defendants failed to follow proper accounting procedures in transferring that money, a point which speaks to the defendants' intent. Further, although Jackson might have authority to pay bonuses, Grant Wilson stated that he was unaware that Burruss Company assets pledged to Fleet were the source of these bonuses.

In addition, whether or not Jackson and Carey's actions amounted to a breach of contract is beside the point. Count Two is not based on the defendants' breach of the loan covenants, but rather on their conversion of Fleet's collateral to their own use. This is more than sharp practice or unethical business conduct, as Jackson alleges. Nor is his

argument persuasive that the unauthorized payment of bonuses victimized only The Burruss Company. Although a bank must be the intended victim of a bank fraud scheme, it need not be the immediate victim. *Brandon*, 298 F.3d at 312. Although The Burruss Company was also a victim of defendants' fraud, Fleet suffered the ultimate risk of loss. In light of the government's evidence on this point, Jackson is not entitled to acquittal under Rule 29.

Count Ten

Count Ten of the Indictment charged the defendants with knowingly making a false statement on I.R.S. Form 5500 in violation of 18 U.S.C. §§ 1027 and 2, specifically the statement that The Burruss Company had paid $322,169.00 to the company pension plan when in fact Burruss had made no such contribution when the form was signed. The jury convicted both Jackson and Carey on this count.

Jackson argues that the government has failed to prove either that the form contained a false statement or that he knew that the form contained a false statement at the time he signed it. In fact, the government produced substantial evidence that this statement was false; although the form was signed on October 15, 1999, SunTrust, the custodial trustee, did not actually receive the contribution until April of the next year. Similarly, the government produced evidence that Jackson knew the statement was false when he signed the form. Company policy required Jackson to co-sign checks above a certain value, which suggests that he knew he had not signed a check to SunTrust before signing Form 5500.

Further, he made no effort to correct the form when he was informed in early 2000 that no contribution had been made. Hence, Jackson is not entitled to acquittal under Rule 29, as the evidence in the light most favorable to the government shows that the statement was false and that Jackson knew of its falsity.

Carey also argues that he is entitled to a judgment of acquittal on Count Ten, because there is no evidence that he had any knowledge as to the information presented on the form, that he participated in completing the form, or that he took any action constituting aiding and abetting. To prove aiding and abetting by Carey, however, the government is not required to prove that he participated at every stage of the endeavor. Rather, the defendant need only participate at some stage while knowing of the activity's result and intending to bring it about. *United States v. Burgos*, 94 F.3d 849, 873 (4th Cir.1976). Here, after viewing the evidence in the light most favorable to the government and granting the prosecution all reasonable inferences, the Court does not find that Carey is entitled to acquittal. The government presented evidence both that Carey shared in Jackson's intent to deceive and that he participated in that deception: in terms of the former, he told SunTrust, among others, that the pension contribution check was in the mail when the overwhelming evidence suggests that it was not; he created false accounting entries to cover up the nonpayment of the check; and because like Jackson, he was a co-signer on large checks, a rational trier of fact could also infer that he was aware that the

pension check was never written. In terms of the latter, the evidence suggests he was the source of the other Burruss Company information included on Form 5500. Hence, viewing the evidence in the light most favorable to the government and granting the government all reasonable inferences under Rule 29, the Court finds that there was sufficient evidence for the jury's verdict on this count, and thus Carey is not entitled to a judgment of acquittal.

Counts Eleven and Twelve

Counts Eleven and Twelve charged the defendants with converting the assets of, respectively, The Burruss Company's non-union pension plan ("the Company plan") and its union pension plan ("the Union plan"), in violation of 18 U.S.C. §§ 664 and 2. The Burruss Company was required to pay $318,246.27 to the Company Plan through its trustee, SunTrust Bank, by March 15, 2000; similarly, Burruss was required to pay $6,418.45 to the Union Plan. Neither plan was paid, and the jury convicted both defendants of converting these funds to their own use and the use of others.

Jackson offers several grounds for acquittal on these counts. He argues first that Burruss' unpaid contributions were not assets of the plan. Section 664 criminalizes the conversion of "moneys, funds, securities, premiums, credits, property, or other assets" of an employee pension plan or any fund connected therewith. 18 U.S.C. § 664. The statute offers no guidance as to the definition of an "asset," and the Fourth Circuit has not addressed this issue. Other circuits appear to be split. *See ITPE Pension*

Fund v. Hall, 334 F.3d 1011, 1013-14 (11th Cir.2003) (holding that in a suit under ERISA to determine when corporate employees may be imputed fiduciary duties, unpaid employer contributions to a benefit plan are not plan assets unless the agreement between the employer and the fund specifically declares otherwise); *Cline v. Industrial Maintenance Engineering & Contracting Co.*, 200 F.3d 1223, 1234 (9th Cir.2000) (holding that employer contributions do not become plan assets until actually paid to the plan); *Professional Helicopter Pilots Ass'n v. Denison*, 804 F.Supp. 1447, 1453-54 (M.D.Ala.1992) (holding that employer contributions do not become plan assets to which a fiduciary obligation attaches until they are paid). *But see* *United States v. LaBarbara*, 129 F.3d 81 (2d Cir.1997) (holding that under 18 U.S.C. § 664, an employer's contractual obligation to pay a contribution to a fund is an "asset" of that fund); *In re Luna*, 406 F.3d 1192 (10th Cir.2005) (disagreeing with *ITPE Pension Fund*, following *LaBarbara*, and holding that the contractual right to unpaid plan contributions is an "asset" under ERISA); *United States v. Panepinto*, 818 F.Supp. 48, 50 (E.D.N.Y.1993) (holding that unpaid employer contributions are plan assets where, under the underlying wage agreement, the employer has "no legal or equitable right to the monies which should have been contributed to the plan.")

At trial, the Court followed the reasoning of *LaBarbara* and *Luna* and instructed the jury that employer contributions became a plan asset when they were due and payable to the plan. Although courts have reached differing conclusions on this point, these cases offer the better rule. *ITPE Pension*

Fund, Cline, and *Professional Helicopter Pilots Association* all address whether employer contributions constitute a plan asset under ERISA. Notably, none of these cases interprets Section 664, which does not refer exclusively to plan "assets," but addresses the conversion of "any of the moneys, funds, securities, premiums, credits, property or other assets" of a plan or "any fund connected therewith." 18 U.S.C. § 664.

In interpreting a statute, a court should begin by examining the language used in the statute. *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 653 (4th Cir.1996). Absent ambiguity or a clearly expressed legislative intent to the contrary, a court should give a statute's language its plain and ordinary meaning. *Williams v. Taylor*, 529 U.S. 420, 431, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). The use of the word "credit" indicates that Section 664 reaches beyond those funds actually in a plan account and encompasses the funds an account might also treat as its own. The Oxford English Dictionary defines "credit" as, *inter alia,* "any note, bill, or other document on security of which a person may obtain funds." *http://dictionary.oed.com* (last visited June 5, 2006). A credit is also defined as "an amount or sum placed at a person's disposal by a bank ... [or] an entry on the right-hand side of an account constituting an addition to a revenue, net worth or liability account," *Merriam-Webster's Collegiate Dictionary* 272 (10th ed.1993), and "the correlative of a *debt;* that is, a debt considered from the creditor's standpoint, or that which is incoming or due *to* one." *Black's Law Dictionary* 331 (5th ed.1979). Given this understanding of "credit," *Cline,*

and *Professional Helicopter Pilots Association* are inapposite, as they treat as plan assets only those funds already paid into an account.

ITPE Pension Fund is also distinguishable, as it addresses the circumstances when corporate employees have fiduciary obligations. 334 F.3d at 1013-14. As will be discussed below, Section 664 applies more broadly, and prohibits conversion by "any person," not merely by a fiduciary. In contrast, *Panepinto* and *LaBarbara* both speak to the nature of a plan asset under Section 664, and are thus more relevant to the question at issue here.[FN2]

FN2. Jackson also cites a case interpreting Section 664, *Young v. West Coast Industrial Relations Association*, 763 F.Supp. 64, 75 (D.Del.1991). There the court looked to the underlying collective bargaining agreement between the parties to determine whether the unpaid contributions were plan assets, but it construed the agreement's language more strictly than the district court did in *Panepinto*. Specifically, the *Young* court required that the agreement specify that title to due and owing monies was "vested" in the plan trustees. *Id.* Given the broad language of Section 664, the Court does not believe that the word "vested" must be used in order for an unpaid employer contribution to be a plan asset.

Jackson also argues that, even if the unpaid contributions were assets of the plan, he was not a fiduciary of the plan. The plain language of the statute, however, refers to "any person" who abstracts plan assets. 18 U.S.C. § 664. In interpreting the statute, courts have held that a defendant need not hold any particular status as to the plan or be a fiduciary in order to be found guilty. *See, e.g., United States v. Grizzle*, 933 F.2d 943 (11th

Cir.1991). One may embezzle or convert without being a fiduciary, and the statute makes no reference to fiduciary status. Hence, Jackson's argument on this point must also fail.

Finally, Jackson argues that there is no evidence that he intended to defraud. Section 664 requires the government to prove that a defendant acted with the intent to deprive a retirement plan of its funds or with reckless disregard for the interests of a retirement plan. *U.S. v. Krimsky*, 230 F.3d 855, 861 (6th Cir.2000). At trial, the government introduced notes in Jackson's handwriting from his planner and notepads indicating that he knew the pension contributions were due. The government also showed that he ignored reminders from SunTrust representatives and others to pay the pension contribution. Taken in the light most favorable to the government, this evidence tends to establish that Jackson acted with reckless disregard for the interests of the pension plans. Thus, he is not entitled to acquittal under Rule 29.

Defendant Carey also argues that he is entitled to acquittal on Counts Eleven and Twelve. His rational is similar to Jackson's: he argues that he must be a plan administrator in order to be found guilty of these counts. This argument fails for the same reason that Jackson's argument does: Section 664 does not require that a defendant hold any particular status, but by its own terms refers to "any person" who embezzles plan funds. *See* 18 U.S.C. § 664; *Grizzle*, 933 F.2d at 947.

Carey also argues that Counts Eleven and Twelve should be dismissed as to him because there is no evidence that he converted the plan funds to his own use. The terms of the statute impose no such requirement, however. Rather, Section 664 refers to one who "converts to his own use or the use of another." In *United States v. Santiago*, 528 F.2d 1130, 1133 (2d Cir.1976), the court held that diverting funds earmarked for a union pension fund to the union's general coffers fell within the meaning of "another" in the statute and constituted a violation of Section 664. By the same token, the government presented sufficient evidence in this case that Carey helped convert funds required to be paid to the Burruss pension plans to the use of the Burruss Company in order to prolong its appearance of solvency. Hence, Carey is not entitled to acquittal on these counts.

Count Thirteen

Count Thirteen charged the defendants with violating 18 U.S.C. § 669 by converting the assets of a health care benefit program, namely The Burruss Company's health plan, by withholding contributions from employees' paychecks without paying these into the plan account. Both Jackson and Carey were convicted on this count. Jackson argues that he is entitled to acquittal on this count because the government has failed to prove that the employee withholdings were assets of the plan. He argues that Burruss was required to reimburse the plan provider, PCHP, for health care costs regardless of the amounts withheld from employees' pay, and thus

that the amounts withheld were not assets of the plan.

ERISA regulations speak directly to this point, and state that the definition of an employee benefit plan asset includes "amounts that a participant has withheld from his wages by an employer, for contribution to the plan as of the earliest date on which such contributions can reasonably be segregated." 29 C.F.R. 2510.3-102(a). *See also LoPresti v. Terwilliger*, 126 F.3d 34, 39 (2d Cir.1997) (holding that employee contributions are assets of a welfare plan). Cases interpreting this provision do not appear to support Jackson's argument that employee contributions are not assets when an employer's responsibility to pay into the plan is not limited by the amounts contributed by employees. *See Phelps v. C.T. Enterprises, Inc.*, 394 F.3d 213, 220, 221 (4th Cir.2005). *See also Pension Benefit Guar. Corp. v. Solmsen*, 671 F.Supp. 938, 945 (E.D.N.Y.1987) (holding a defendant liable under ERISA, before the enactment of the regulation at issue, for failing to forward employee contributions to a benefit plan and instead using them for corporate purposes). Hence, merely by showing that funds were withheld from employee paychecks for contribution to PCHP, the government presented sufficient evidence that these funds were plan assets. Jackson is therefore not entitled to acquittal on this point.

Defendant Carey also argues that he is entitled to acquittal on Count Thirteen, based on the same arguments he propounded for Counts Eleven and Twelve. For the reasons described above, his

motion for acquittal on Count Thirteen must also be denied.

Count Fourteen

Count Fourteen charged the defendants with conspiracy under 18 U.S.C. § 371 to commit all of the substantive acts listed in the indictment. The jury convicted Jackson on this count but acquitted Carey. Jackson argues that he is entitled to acquittal as well because the government has failed to present evidence that he and Carey agreed to commit these acts, and because there can be no conspiracy where the jury acquitted the only other co-conspirator.

As Jackson notes, however, the acquittal of the sole co-conspirator does not require reversal of the defendant's conspiracy conviction. *United States v. Thomas*, 900 F.2d 37, 40 (4th Cir.1990). Further, the government has presented sufficient evidence for a rational trier of fact to find that Jackson and Carey conspired. A conspiracy may be proved by direct or circumstantial evidence. *United States v. Burgos*, 94 F.3d 849, 857-58 (4th Cir.1996), and the government offered circumstantial evidence that Jackson and Carey agreed to carry out the offenses charged. Witnesses testified that the defendants had frequent closed-door meetings and that Carey consulted Jackson on all major and most minor issues. As noted above, the government also presented a notation in Jackson's handwriting suggesting that the value of certain inventory be inflated. Further, Jackson was aware of the nonpayment of Burruss' benefit plan obligations and the inflation of the

accounts receivable numbers, but he took no action to remedy these situations.

In addition, the government presented evidence sufficient for the jury to have found that Jackson conspired with other Burruss employees not charged in the indictment. There is no requirement that the indictment charge or even name all co-conspirators; the existence of the conspiracy, rather than the identity of the coconspirators, is an element of the crime. *United States v. American Waste Fibers Co.*, 809 F.2d 1044, 1046 (4th Cir.1987). The government presented evidence sufficient for the jury to find that Jackson conspired with Donna Elliot regarding the inflation of the borrowing base certificates. As numerous courts have noted, criminal conspiracies are by their nature secret and thus can rarely be proven by direct evidence. Given this and ample other circumstantial evidence, however, and allowing all reasonable inferences in the government's favor, a rational trier of fact could find that Jackson conspired to carry out the overt acts charged. Hence, Jackson is not entitled to acquittal on this count.

Carey argues that because he was acquitted of conspiracy under Count Fourteen, he is also entitled to acquittal on all of the predicate offenses charged in Counts One through Thirteen. He cites no authority for this novel position, nor is the Court aware of any. The mere fact that the jury did not find that the government carried its burden of proof as to all of the elements of conspiracy does not mean that the jury necessarily found that the government had failed to prove Carey engaged in the predicate

acts charged-especially when the jury in fact found him guilty of those acts. His motion for acquittal must therefore be denied.

Rule 33 Motion for New Trial

Defendant Jackson also moves for a new trial under Rule 33, arguing (1) that the Court's instructions regarding the definition of "plan assets" with regard to Counts Eleven, Twelve, and Thirteen was contrary to law; (2) that the Court committed reversible error by preventing the defendants from presenting evidence on the actions and compensation of the individuals who controlled Burruss after October 18, 2000; and (3) that his motion for mistrial based on a witness' potentially prejudicial testimony should have been granted.

Jackson's first argument for a new trial is essentially a recasting of his argument for acquittal on Counts Eleven, Twelve, and Thirteen: the Court erroneously defined "plan assets" in the jury instructions. The Court addressed and rejected this argument with regard to Jackson's Rule 29 motion, and that reasoning applies equally to his Rule 33 motion.

As to Jackson's second argument for a new trial, the Court ruled during trial that evidence regarding the actions of other individuals after the defendants were removed from their positions was irrelevant and inadmissible. The defendants' theory in seeking to admit this evidence, presumably, was that Burruss' nonpayment of its obligations and ultimate downfall was caused at least in part by the

actions and compensation packages of those who took over management after Jackson and Carey were removed. This argument misconstrues the nature of the charges, however. None of the charges against the defendants alleges any action by them after October 20, 2000; according to the indictment, their offenses were complete by that time. Whether or not someone else acted or failed to act after October 20, 2000 does not affect the defendants' actions before that time, which were the subject of the indictment. Hence, the interests of justice do not require that the Court grant Jackson a new trial based on the nonadmission of this evidence.

Finally, Jackson argues for a new trial based on potentially prejudicial testimony. At trial, a witness said that one Burruss employee did not have sufficient burial funds because his pension was being held up by the Burruss bankruptcy. This is not sufficient grounds for a new trial. The witness was stopped before she could finish her statement, and the Court gave an immediate cautionary instruction. The risk of prejudice from this statement was slight, given its partial nature and the substantial evidence the government presented regarding Burruss' nonpayment of its pension obligations. *See* United States v. Powers, 59 F.3d 1460, 1468 (4th Cir.1995). Hence, the fact that the jury was exposed to this partial statement is not the kind of error that would require reversal on appeal, and hence Jackson's motion for new trial on this point must also be denied.

Conclusion

Viewed in the light most favorable to the government in conjunction with all reasonable inferences in the government's favor, the evidence supports the defendants' convictions. Hence, neither Jackson nor Carey is entitled to a judgment of acquittal under Rule 29. In addition, the interests of justice do not require that Jackson be granted a new trial under Rule 33. Accordingly, the defendants motions for acquittal and new trial are hereby denied.

An appropriate order shall issue this day.

No. 08-263

In the Supreme Court of the United States

JOHN ALVIS JACKSON, JR. AND
LARRY ANDREW CAREY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether employer contributions to a pension plan covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, become "assets of [the] * * * plan" within the meaning of 18 U.S.C. 664 when they are due to the plan even if they have not yet been paid.

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In the Supreme Court of the United States

No. 08-263

JOHN ALVIS JACKSON, JR. AND
LARRY ANDREW CAREY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-36) is reported at 524 F.3d 532. The memorandum opinion of the district court denying petitioners' post-trial motion for an acquittal and a new trial (Pet. App. 37-58) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2008. A petition for rehearing was denied on May 27, 2008 (Pet. App. 1). The petition for a writ of certiorari was filed on August 25, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Virginia, petitioners were convicted on two counts of bank fraud, in violation of 18 U.S.C. 1344; five counts of wire fraud, in violation of 18 U.S.C. 1343; one count of making false statements in a document required by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, in violation of 18 U.S.C. 1027; two counts of theft from ERISA-covered pension plans, in violation of 18 U.S.C. 664; and one count of theft from a health care benefit program, in violation of 18 U.S.C. 669. Pet. App. 3. Petitioner Jackson was also convicted of conspiracy to commit those offenses, in violation of 18 U.S.C. 371. Pet. App. 4. Petitioner Jackson was sentenced to 108 months of imprisonment, and petitioner Carey was sentenced to 87 months of imprisonment. *Ibid.* The court of appeals affirmed. *Id.* at 2-36.

1. Petitioner Jackson was the President and Chief Executive Officer of the Burruss Company (Burruss), a wood products business with its headquarters in Galax, Virginia, and manufacturing plants in Virginia, Tennessee, and Kentucky. Pet. App. 5. Petitioner Carey was Burruss's Chief Financial Officer. *Id.* at 6. Burruss maintained for its employees an ERISA-covered money purchase pension plan sponsored by the company (company plan) and an ERISA-covered money purchase pension plan sponsored by a labor union (union plan). *Id.* at 12. Crestar Bank (later SunTrust) was the trustee for both plans. *Id.* at 14. Burruss was the plan administrator for the company plan, and Carey was an assistant to the plan administrator. Carey was also plan administrator for the union plan. *Id.* at 13.

The company plan was an individual account plan, funded by employer contributions, which were allocated to accounts within the plan for each eligible participant. Pet. App. 12; see 29 U.S.C. 1002(34). Each year, Burruss was obligated to contribute to the plan three percent of the aggregate annual compensation of all eligible participants. Pet. App. 12. Burruss was required to allocate and credit the annual employer contributions to the proper participant accounts and to provide each plan participant with an annual account statement, as of the last day of the calendar year. *Id.* at 12-13.

The union plan also required Burruss to establish a bookkeeping account for each employee, to add to each account the participant's share of Burruss's annual plan contributions, and to prepare a participant statement after completing the allocations for the valuation date at the end of the plan year. Pet. App. 13. The plan defined the valuation date as the last day of the plan year, and it defined the plan year as the twelve consecutive months ending on December 31. *Ibid.* Burruss was required to contribute and to allocate to the account of each eligible participant an amount equal to 15 cents for each hour of service by that participant. *Ibid.*

In the mid-1990s, Burruss negotiated a loan agreement with Fleet Capital Corporation (Fleet) that keyed Burruss's borrowing capacity to its assets and required that all of its assets be pledged as collateral for the loan. Pet. App. 6-7, 9. Shortly thereafter, Burruss began to encounter financial problems. *Id.* at 8-9. To hide Burruss's deteriorating financial condition, make the company more attractive to potential buyers, and enrich themselves, petitioners began inflating Burruss's assets on reports filed with Fleet so that they could obtain more funds under the loan. *Id.* at 10-11, 19. Petitioners

also sold assets owned by Burruss but pledged to Fleet as collateral and deposited those proceeds into a secret bank account from which they wrote checks for their personal use. *Id.* at 11.

At the same time, petitioners intentionally failed to make payments that Burruss owed to its pension plans and lied about the missing payments. Pet. App. 14-16. In particular, as of December 31, 1998, Burruss owed approximately $322,000 to the company plan for calendar year 1998, but petitioners failed to make that payment when due. *Id.* at 14. On October 15, 1999, even though the 1998 contribution still had not been made, Burruss filed with the Department of Labor (DOL) a Form 5500, signed by petitioner Jackson, stating that the contribution had been made. *Ibid.* After repeated requests from the plan trustee, petitioners eventually made the 1998 contribution, but not until April 18, 2000. *Id.* at 14-15.

For plan year 1999, Burruss was obligated to contribute more than $324,000 to the company and union plans. Pet. App. 15. Jackson and Carey were aware that the payments were due, at the latest, by September 15, 2000. *Id.* at 15-16. As the due date approached, a representative of the plans' trustee repeatedly reminded Carey that the payments were due. *Id.* at 16. Although Carey assured her that Burruss would make the payments, it never did. *Ibid.* After Burruss failed to make the payments, the trustee's representative, Sybill Wolf, contacted petitioners several times to inquire about the payments. *Ibid.* Jackson directed her to speak to Carey, who generally avoided the calls and, when he did respond, asserted that a mistake must have been made. *Ibid.* On October 18, 2000, the trustee sent a letter to Burruss noting that the company had not made the pay-

ments and that it could be penalized for that failure. *Ibid.*

Meanwhile, in early September 2000, the trustee had prepared and delivered to Burruss the individual account statements for both plans for calendar year 1999. Pet. App. 16. The account balances reported on the statements reflected that Burruss would make the 1999 contributions. After Burruss failed to make the contributions, the trustee issued new statements to the participants indicating that adjustments had been made to the individual accounts to reflect Burruss's failure to make the payments. *Ibid.*[1]

Burruss's financial condition continued to deteriorate throughout the fall of 2000. Pet. App. 18-19. On November 7, 2000, after all efforts to sell the company failed, Burruss declared bankruptcy. *Id.* at 19.

2. In September 2005, a grand jury in the Western District of Virginia returned an indictment against petitioners charging them with numerous offenses arising from the conduct described above. Pet. App. 4; C.A. App. 36-64 (Indictment). As relevant here, Counts 11 and 12 of the indictment charged petitioners with theft from an ERISA-covered plan, in violation of 18 U.S.C. 664, based on their failure to pay the 1999 contributions to the company and union plans. C.A. App. 59-61.

Specifically, Count 11 charged that "the annual contribution owed by Burruss to the Company Plan for calendar year 1999 was an asset of the Company Plan";

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[1] Burruss also maintained a health care plan for its employees. Burruss made weekly deductions from employees' earnings for contributions to that plan. In 2000, Burruss failed to transmit all of the withheld employee contributions to the plan. As a result, by October 2000, the plan ceased paying health care claims, resulting in substantial unpaid medical expenses for the covered Burruss employees. Pet. App. 17.

Burruss owed "an amount not less than $318,246.27" for plan year 1999; that contribution "was required to be paid on or before March 15, 2000, to the Trustee of the Company Plan, SunTrust Bank"; but "[t]hose funds were not paid by March 15, 2000 as required, and, in fact, were never paid." C.A. App. 59-60. Count 11 further charged that, "between on or about January 1, 1999 and on or about March 15, 2000," petitioners, "while fiduciaries of the Company Plan, did embezzle, steal and unlawfully and willfully abstract and convert to their own use, and to the use of others, an amount not less than $318,246.27, which constitutes moneys, funds, securities, premiums, credits, property and other assets of the Company Plan." *Id.* at 60. Count 12 made similar charges with respect to the 1999 contribution for the union plan, which was approximately $6,418.45. See *id.* at 60-61.

Petitioners pleaded not guilty and were tried before a jury. Pet. App. 4. The judge instructed the jury that, to find petitioners guilty of the charges under Section 664, the jury had to find that the government had proved three elements beyond a reasonable doubt:

> One: [petitioners] [fraudulently and] willfully embezzled, stole, or converted property, money, or funds to [their] own use or the use of another;
>
> Two: the property, money, or funds taken belonged to an employee benefit plan subject to ERISA;
>
> Three: that [petitioners] acted with the intent to deprive the pension plan of its funds, with reckless disregard for the interests of the pension plan.

C.A. App. 2220. The court further instructed the jury that "[m]onies, funds, securities, premiums, credits,

property, and other assets became assets of the [company and union plans] when they were due and payable to the trustee of the plans." *Id.* at 2222.

In its closing argument to the jury, the government argued that petitioners violated Section 664 because the 1999 contributions to the plans were "never paid" but were, "instead, converted to the use of another"—"the Burruss Company." C.A. App. 2253. The government argued that petitioners knew that they were required to make the contributions, "[b]ut this year money was tight. And they decided to keep the money for the Burruss Company[,] for them; not for the employees, not for the pension plan." *Id.* at 2254. Rather than make the contributions, the government observed, petitioners paid themselves bonuses and paid suppliers to keep the business going in an effort to sell it. *Id.* at 2255. When petitioners "chose to take the money owed to the pension plan * * * and to use it for something else," the government contended, "they converted it to the use of themselves or another." *Id.* at 2254-2255. The jury found petitioners guilty of the bulk of the charges against them, including the Section 664 offenses. Pet. App. 19-20.

After trial, petitioners renewed motions for acquittal that they had made during trial and sought, in the alternative, a new trial. Pet. App. 19-20. The district court denied the motions. *Id.* at 37-58. As relevant here, the court rejected petitioners' contention that the evidence was insufficient on the Section 664 charges because "Burruss' unpaid contributions were not assets of the plan." *Id.* at 47. The court concluded that it had correctly instructed the jury that "employer contributions became a plan asset when they were due and payable to the plan." *Id.* at 48. The court also rejected petitioner

Carey's contention that he had not converted the unpaid contributions to his own use, reasoning that Carey had helped "convert funds required to be paid to the Burruss pension plans to the use of the Burruss Company in order to prolong its appearance of solvency." *Id.* at 52.

The district court also rejected petitioner Jackson's contention that, even if the unpaid contributions were assets of the plans, he was not a fiduciary of the plans. Pet. App. 50. The court held that "[t]he plain language of the statute" makes clear that "a defendant need not hold any particular status as to the plan or be a fiduciary in order to be found guilty." *Ibid.*

3. The court of appeals affirmed. Pet. App. 2-36. As relevant here, the court rejected petitioners' claim that their convictions under Section 664 "must be vacated, as a matter of law, because 'unpaid employer contributions are not assets of a plan until they are paid into the plan unless the plan documents specifically state otherwise.'" *Id.* at 24 (quoting Pet. C.A. Br. 28-29). The court concluded that the district court had correctly "ruled that unpaid employer contributions become 'credits' and are ERISA 'plan assets' when they are 'due and payable to the plan.'" *Id.* at 25.

The court of appeals noted that "[Section] 664 does not explicitly provide that unpaid employer contributions constitute ERISA plan assets," but, the court stated, 29 U.S.C. 1103 "specifies that such assets are held in trust, and not for the employer's benefit." Pet. App. 26. The court further observed that the Second Circuit, in *United States* v. *LaBarbara*, 129 F.3d 81 (1997), had held that "an employer must comply with its contractual obligations to make contributions to its ERISA plan, and that such a contractual obligation constitutes an 'asset' of the ERISA plan." Pet. App. 26-27

(citing *LaBarbara*, 129 F.3d at 88, and *In re Luna*, 406 F.3d 1192, 1198-1201 (10th Cir. 2005)). The court of appeals then reasoned that, "[w]hen Burruss established its ERISA pension plans, it bound itself to the terms thereof," which required annual contributions. *Id.* at 27. The court noted that "Burruss could properly extricate itself from those ERISA obligations only by proper termination of the Plans." *Ibid.* Stating that it "agree[d] with the district court and the Second Circuit," the court of appeals held that "Burruss's unpaid contributions to the Plans constituted the 'moneys, funds, or assets' thereof for purposes of § 664." *Id.* at 27-28.

The court of appeals also rejected petitioners' related contention that they could not be convicted under Section 664 because they were not fiduciaries of the plans. Pet. App. 28-29. The court held that the district court had correctly ruled that Section 664 "plainly applies to 'any person' who steals or embezzles the moneys, funds, or assets of an ERISA plan." *Id.* at 28. The court of appeals noted that the jury instructions "did not mandate a jury finding that [petitioners] were fiduciaries." *Ibid.* Although the indictment had charged that petitioners were fiduciaries, the court concluded that the surplusage in the indictment was not reversible error because petitioners had not raised a variance or surplusage claim, the statute does not require fiduciary status, and the evidence established that petitioners were fiduciaries in any event. *Id.* at 28-30.

DISCUSSION

Petitioners contend (Pet. 5-12) that their Section 664 convictions should be reversed because unpaid employer contributions are not "assets" of an ERISA plan unless the plan documents provide otherwise. Although the

government argued in the courts below that unpaid employer contributions are plan assets, the government now agrees with petitioners after closer consideration of DOL's position on this issue and the other authorities discussed in this brief.

DOL's position—grounded in agency pronouncements going back at least 15 years—is that, absent provisions in plan documents giving the plan a beneficial interest in unpaid contributions, the contributions themselves are not assets of the plan until the contributions are paid to the plan. The plan's contractual right to the unpaid contributions, in contrast, is an asset of the plan once the contributions are due. The decisions of the courts of appeals have uniformly followed that rule, which is consistent with common-law principles. The decision below appears to depart from that rule, but, even if it could be interpreted, consistently with the decisions of other courts of appeals, as holding only that a plan's contractual right to payment is a plan asset, the government did not prove that petitioners "embezzle[d], st[ole], or unlawfully and willfully abstract[ed] or convert[ed]" that contractual right. 18 U.S.C. 664. Accordingly, this Court should grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and remand for further proceedings in light of the position expressed in this brief.

1. a. Section 664 punishes "[a]ny person" who "embezzles, steals, or unlawfully and willfully abstracts or converts * * * any of the moneys, funds, securities, premiums, credits, property, or other assets of any * * * employee pension benefit plan, or of any fund connected therewith." 18 U.S.C. 664. Section 664 defines "employee pension benefit plan" to mean "any employee benefit plan subject to any provision of title I of

the Employee Retirement Income Security Act of 1974." *Ibid.*

Although Section 664 was originally enacted before ERISA, see Welfare and Pension Plans Disclosure Act Amendments of 1962, Pub. L. No. 87-420, § 17(a), 76 Stat. 41, it was amended by ERISA specifically to apply to ERISA-covered plans, see Pub. L. No. 93-406, § 111(a)(2)(A), 88 Stat. 851 (29 U.S.C. 1031(a)(2)(A)). Accordingly, Congress presumably intended plan "assets" to have the same meaning in Section 664 that the term has throughout ERISA. See *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995).

ERISA does not provide a definition of the "assets" of an ERISA plan. *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 89 (1993). DOL, which is charged with the administration and enforcement of Title I of ERISA, see 29 U.S.C. 1132(a) (2000 & Supp. V 2005); 29 U.S.C. 1134, 1135, 1137, has, however, addressed the meaning of plan assets in regulations and advisory opinions.

In addition to a general "plan assets" regulation concerning investments, 29 C.F.R. 2510.3-101, DOL has promulgated a regulation that specifically defines when *employee* contributions become plan assets. That regulation makes clear that amounts deducted from an employee's compensation for contribution to a plan become plan assets as soon as those funds "can reasonably be segregated" from the employer's general assets. 29 C.F.R. 2510.3-102(a). Neither regulation, however, addresses when *employer* contributions become plan assets.

DOL has consistently expressed the view that, in situations not covered by the plan asset regulations, "the assets of a plan generally are to be identified on the ba-

sis of ordinary notions of property rights under non-ERISA law." Advisory Op. No. 93-14A (May 5, 1993) (AO); see AO No. 2005-08A (May 11, 2005); AO No. 94-31A (Sept. 9, 1994); AO No. 92-22A (Oct. 27, 1992). The assets of a plan thus "include any property, tangible or intangible, in which the plan has a beneficial ownership interest," taking into account "any contract or other legal instrument involving the plan, as well as the actions and representations of the parties involved." AO 93-14A.

Accordingly, absent express contractual provisions indicating that the plan's beneficial ownership commences when contributions are due, employer contributions become assets of the plan only when they are actually paid to the plan. Under ordinary principles of property law, a company's failure to pay its contractual obligations when due does not give the creditor a property interest in the company's assets. A general creditor does not have any property interest in the assets of a debtor. See *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 319-320 (1999). A debt is not a trust, and a debtor is not a fiduciary of the debt owed the creditor. See Restatement (Second) of Trusts § 12 (1959). Thus, as this Court held more than 70 years ago, an employer's failure to make contributions to an employee benefit plan generally does not give the plan "equitable title to or a lien upon any part of the employer's property. The assets of the employer remain[], as they were before, general assets." *McKee* v. *Paradise*, 299 U.S. 119, 122 (1936); see *id.* at 123 ("failure to pay * * * cannot avail to change the [company] into a trustee or enable the [plan] to obtain a preference

over other claims" against the company).[2] In accordance with those settled legal principles, DOL has taken the view that, as a general rule, "employer contributions become an asset of the plan only when the contribution has been made." Employee Benefits Sec. Admin., U.S. DOL, *Field Assistance Bulletin 2008-1*, at 1-2 (Feb. 1, 2008) (*FAB 2008-1*).

The fact that unpaid employer contributions are not themselves assets of the plan does not mean, however, that the plan obtains no property interest whatsoever as a result of the employer's contractual obligation. On the contrary, the contractual right to receive the contributions and the concomitant right to sue on the debt are themselves a property interest of the plan. Such rights have traditionally been referred to as "choses in action." See *Mexican Nat'l R.R.* v. *Davidson*, 157 U.S. 201, 204-206 (1895). "The term 'chose in action' is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises, which confer on one party a right to recover a personal chattel or sum of money from another, by action." *Id.* at 206 (citation omitted). "The terms 'choses in actions' and 'debts' are used by courts to represent the same thing when viewed from opposite sides. The chose in action is the right of the creditor to be paid, while the debt is the obligation of the debtor to pay." 63C Am. Jur. 2d *Property* § 22

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[2] *McKee* involved funds that the employer had deducted from employee wages. 299 U.S. at 120. Such payroll deductions are now expressly addressed by DOL's employee contributions regulation, which, as discussed above, provides that employee contributions become plan assets as soon as the contributions are reasonably segregable from the employer's general funds. See 29 C.F.R. 2510.3-102(a). The common-law principles reflected in *McKee* still govern, however, with respect to employer contributions.

(1997). Choses in action are a form of intangible personal property. *Ibid.*; *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428, 439-440 (1951).

The text of Section 664 supports the conclusion that a plan's contractual right to employer contributions—its "chose in action"—is a plan "asset." Section 664 indicates that plan "assets" include "credits" of the plan. 18 U.S.C. 664. A "credit" is a chose in action —"[t]he correlative of a debt; that is, a debt considered from the creditor's standpoint, or that which is incoming or due to one[;] * * * [a] [c]laim or cause of action for [a] specific sum of money." *Black's Law Dictionary* 331 (5th ed. 1979) (*Black's*); see *Propper* v. *Clark*, 337 U.S. 472, 480 (1949) (stating that the "ordinary meaning" of "credit" is "the obligation due on accounting between parties to transactions"); *Robinson* v. *United States*, 30 F.2d 25, 28 (6th Cir. 1929) (stating that the term "credits," in a statute prohibiting theft or misapplication of bank funds, "refers to obligations or debts of others to the bank"). Thus, DOL has taken the view that, "when an employer fails to make a required contribution to a plan in accordance with the plan documents, the plan has a claim against the employer for the contribution, and that claim is an asset of the plan." *FAB 2008-1*, at 2.

b. DOL's position that employer contributions generally are not plan assets until paid, but the plan's contractual right to payment is itself a plan asset, is entitled to judicial deference. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that DOL's interpretations in opinion letters of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); *Kalda* v.

Sioux Valley Physician Partners, Inc., 481 F.3d 639, 647 (8th Cir. 2007) (finding "the Secretary's reasoning in its rulings regarding 'plan assets' thorough, valid, and particularly consistent). It also enjoys significant support in background principles of law that inform the interpretation of 18 U.S.C. 664.

Adopting the contrary view that unpaid employer contributions are always plan assets would have consequences that Congress could not have intended. If unpaid contributions were plan assets, ERISA's requirements would govern the normal operations of an employer's business whenever it failed to timely pay contributions. As soon as contributions were past due, an undifferentiated part of the employer's assets would become plan assets, and the employer would find itself in the unmanageable position of being a plan fiduciary in its general business activities. The employer would have to manage the funds constituting plan assets (and arguably the general accounts in which the funds were commingled) with undivided loyalty to plan participants and beneficiaries, rather than the company's shareholders. 29 U.S.C. 1104(a). The employer would have to refrain from self-dealing and transactions with parties in interest, including corporate affiliates and officers. *Ibid.*; 29 U.S.C. 1106. And the employer would have to comply with ERISA's other fiduciary provisions, such as the requirement that plan assets be held in trust and that they not inure to the benefit of the employer. 29 U.S.C. 1103 (2000 & Supp. V 2005). Concern about those potential consequences could discourage employers from participating in ERISA plans.

Moreover, if an employer's failure to pay its debts to a plan caused the employer to hold plan assets, then presumably any other debtor to a plan would likewise hold

plan assets if it was delinquent in paying its debt. Such a rule would likely discourage many valuable financial transactions between plans and third parties. Generally, when a party enters into a commercial transaction, it risks contractual liability for non-performance, but its general assets do not become impressed with a trust, and it remains free to pursue its business interests for the benefit of its partners or shareholders. If, however, unpaid debts to an ERISA plan caused the debtor to assume fiduciary status and to take on corresponding fiduciary duties and liabilities, many entities would avoid commercial transactions with plans on the same terms offered to less risky counter-parties.

DOL's interpretation of plan assets, under which the plan's asset in unpaid debts is limited to its contractual right to payment *(i.e.*, its credit or chose in action), avoids those far-reaching consequences. At the same time, it ensures that plan fiduciaries will pursue the plan's right to payment on the debts, because the fiduciary has an obligation to manage the chose in action prudently and in the interests of plan participants and beneficiaries. See 29 U.S.C. 1104(a); *FAB 2008-1*, at 2-3.

2. a. The decisions of the courts of appeals, with the possible exception of the decision below, accord with DOL's interpretation of when employer contributions become plan assets. The Tenth Circuit's decision in *In re Luna* provides the clearest explanation of the rule. The Tenth Circuit held that "an ERISA plan does not have a present interest in the unpaid contributions until they are actually paid to the plan." *In re Luna*, 406 F.3d 1192, 1199 (2005) (emphasis omitted). But the court further stated that, "although the plan does not possess the unpaid contributions themselves, it does possess the *contractual right* to collect them." *Id.* at 1200. That

"chose in action," the Tenth Circuit stressed, is itself "a property interest" of the plan. *Id.* at 1199.

The decisions of other courts of appeals are in accord. Those courts have recognized that "unpaid employer contributions are not assets of [an ERISA plan] unless the agreement between the [plan] and the employer specifically and clearly declares otherwise." *ITPE Pension Fund* v. *Hall*, 334 F.3d 1011, 1013 (11th Cir. 2003); accord *In re Bucci*, 493 F.3d 635, 642 (6th Cir. 2007); see *In re M&S Grading, Inc.*, 541 F.3d 859, 865 (8th Cir. 2008) (stating that "unpaid [employer] contributions remained corporate assets and did not become assets of the plan"); *Cline* v. *Industrial Maint. Eng'g & Contracting Co.*, 200 F.3d 1223, 1234 (9th Cir. 2000) (holding that, "[u]ntil the employer pays the employer contributions over to the plan, the contributions do not become plan assets over which fiduciaries of the plan have a fiduciary obligation"); see also *United States* v. *Panepinto*, 818 F. Supp. 48, 51 (E.D.N.Y. 1993) (construing plan language stating that no "Employer shall have any legal or equitable right, title or interest in or to any sum paid by or due from the Employer" as vesting in the plan ownership of unpaid employer contributions) (citation omitted), aff'd, 28 F.3d 103 (2d Cir. 1994) (Table); cf. *Kalda*, 481 F.3d at 648 (holding that unpaid contributions were not plan assets because the plan documents did not obligate the employer to make the payments).

Other courts of appeals have also recognized that an employer's "contractual obligations" to ERISA plans "constitute[] 'assets' of the [plans]." *United States* v. *LaBarbara*, 129 F.3d 81, 88 (2d Cir. 1997); see *ITPE Pension Fund*, 334 F.3d at 1014 n.4 (stating that "[a] receivable is a contractual or legal claim for payment of

the money due, in contrast to the actual money due," and, although a receivable may be an asset of the plan, that fact does not make the *receivable property*, *i.e.*, "the actual money due," a plan asset).

b. The government did not fully address DOL's position and related authorities in its court of appeals brief in this case. And, perhaps due to the absence of a such a discussion, the decision of the court of appeals appears to have departed from the uniform approach of DOL and the other courts of appeals and incorrectly held that "unpaid employer contributions" are themselves "plan assets" when they are "due and payable to the plan." Pet. App. 25 (quoting district court opinion). See *id.* at 27-28 (holding that "Burruss's unpaid contributions to the Plans constituted the 'moneys, funds, or assets' thereof for purposes of § 664").

The precise holding of the court below is not entirely clear, because the court expressly relied on *LaBarbara*, which it correctly described as holding that an employer's "contractual obligation[] to make contributions to its ERISA plan * * * constitutes an 'asset' of the ERISA plan." Pet. App. 26-27; see *id.* at 27 (citing *In re Luna*, 406 F.3d at 1198-1201, for the proposition that a "contractual right to collect unpaid contributions is [a] plan asset"). Thus, it might be possible to read the decision below, consistently with other courts of appeals and DOL's position, as holding only that a plan's contractual right to unpaid employer contributions is a plan asset. That is not, however, the most natural reading of the decision, in light of how the case was charged and tried, and in light of the district court's conclusion that petitioners "convert[ed] *funds* required to be paid to the Burruss pension plans to the use of the Burruss Com-

pany in order to prolong its appearance of solvency." *Id.* at 52 (emphasis added).

3. Even if the decision below could be interpreted as holding only that a plan's contractual right to unpaid employer contributions is a plan asset, petitioners' convictions under Section 664 could not be sustained on the record before this Court, because the government did not prove that petitioners "embezzle[d], st[ole], or unlawfully and willfully abstract[ed] or convert[ed]" that contractual right. 18 U.S.C. 664.

a. "Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come." *Moore* v. *United States*, 160 U.S. 268, 269 (1895). "The words 'steal' and 'stolen' have no certain technical significance," but they are commonly used to embrace "any form of criminal taking" of property. *Factor* v. *Laubenheimer*, 290 U.S. 276, 303 (1933); accord *United States* v. *Turley*, 352 U.S. 407, 417 (1957). "[A]bstract" likewise "is not a word of settled technical meaning" but ordinarily "means to take or withdraw from." *United States* v. *Northway*, 120 U.S. 327, 334 (1887).

Conversion is the "willful interference, without lawful justification, with an item of property in a manner inconsistent with another's right, whereby that other person is deprived of the use and possession of the property." *Black's* 356 (8th ed. 1999). "A conversion of property requires a serious act of interference with the owner's rights," such as "using it up, selling it, pledging it, giving it away, delivering it to one not entitled to it, inflicting serious damage to it, claiming it against the owner," or "unreasonably withholding possession of it from the owner." Wayne R. LaFave & Austin W. Scott, *Criminal Law* 730 (2d ed. 1986). "Conversion may in-

clude misuse or abuse of property" or "use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use." *Morrissette* v. *United States*, 342 U.S. 246, 272 (1952).

Section 664 thus prohibits the range of ways in which someone may wrongfully take or significantly interfere with the property of an ERISA plan, in an effort to "avoid gaps and loopholes between offenses." *Morrissette*, 342 U.S. at 273. "The essence of the crime is theft," which, in the context of pension plans, "includes a taking or appropriation that is unauthorized," if the defendant acts "with a fraudulent intent or a bad purpose or an evil motive." *United States* v. *Andreen*, 628 F.2d 1236, 1241 (9th Cir. 1980) (Kennedy, J.).

b. An ERISA plan's "credits," including its contractual right to employer contributions, can be embezzled, stolen, abstracted or converted in violation of Section 664 in a variety of ways. A defendant can violate the statute by taking the credit itself. For example, a third party might wrongfully attach the employer's debt to the plan, cf. *Englehart* v. *Sage*, 235 P. 767, 769 (Mont. 1925) (sheriff converted debt by wrongfully attaching it), or a plan fiduciary might fraudulently assign the plan's right to the employer contributions to himself or a third party. A defendant also can convert a plan's contractual right to employer contributions by "effectively prevent[ing] the exercise" of the right to collect the contributions. Restatement (Second) of Torts § 242(2) (1965) (Restatement of Torts). Cf. *Plunkett-Jarrell Grocery Co.* v. *Terry*, 263 S.W.2d 229, 233-234 (Ark. 1954) (holding that defendants converted plaintiff's accounts receivable by depriving him of the records necessary to collect them); *Robinson*, 30 F.3d at 29 (suggesting that bank officer would convert a bank's credit if he wrong-

fully extended the term of a customer's debt to the bank, thus "tying the hands of the bank for a definite period against action which might have been taken" to collect the debt). For example, a plan fiduciary would be guilty of conversion of a plan's contractual right to employer contributions if he caused the plan to refrain from collecting the contributions in exchange for a kickback from the employer. See *United States* v. *Uzzolino*, 651 F.2d 207, 209 (3d Cir.), cert. denied, 454 U.S. 865 (1981).

In *LaBarbara*, the Second Circuit held that the defendant converted an ERISA plan's contractual right to employer contributions based on a similar kind of interference with the plan's contractual right. LaBarbara was a union official who had negotiated collective bargaining agreements with an association of employers under which the employers were obligated to contribute to various union-sponsored ERISA plans. LaBarbara assisted Barone, the owner of one of the employers, in a "double breasting" scheme designed to evade Barone's obligations to the plans. *LaBarbara*, 129 F.3d at 83. Under that scheme, Barone created a second company that was not a signatory to the collective bargaining agreement, and Barone had that company pay a portion of his employees' wages, thereby concealing from the plans the existence of their right to certain contributions. *Ibid.* The Second Circuit held that Barone's "contractual obligations to the [plans] * * * constituted 'assets' of the [plans]," and LaBarbara aided and abetted Barone's violation of Section 664 by assisting him in "conceal[ing] [those] contractual obligations." *Id.* at 88.

c. In this case, however, the government did not prove at trial that petitioners embezzled, stole, abstracted or converted the ERISA plans' contractual rights to employer contributions. The government argued that

petitioners converted the assets of the plans because they knowingly failed to make Burruss's contributions to the plans when due and instead used Burruss's funds to support the company and to enrich themselves. See C.A. App. 59-61 (Indictment), 2253-2255 (government's closing argument to the jury); see also *id.* at 2218-2222 (jury instructions); Pet. App. 52 (district court opinion denying motion for acquittal on the ground that petitioners "convert[ed] funds required to be paid to the Burruss pension plans to the use of the Burruss Company").

Petitioners' conduct would have constituted a conversion of the plans' assets if the unpaid contributions were themselves plan assets. See *Panepinto*, 818 F. Supp. at 49-52; see also *United States* v. *Whiting*, 471 F.3d 792, 799-800 (7th Cir. 2006) (employer's agent converted plan assets when it failed to transmit *employee* contributions to the plan because those contributions were plan assets under DOL's regulation); *United States* v. *Grizzle*, 933 F.2d 943, 946-948 (11th Cir.) (same), cert. denied, 502 U.S. 897 (1991). But, as described above, unpaid employer contributions are not plan assets (absent a contractual provision to that effect), and petitioners' conduct did not constitute conversion of the plans' contractual rights to the contributions. Although petitioners reduced the funds that Burruss had available to satisfy the plans' contractual rights, petitioners did not take or impair the rights themselves. Petitioners' conduct also did not "effectively prevent[]" the plans from exercising their rights. Restatement of Torts § 242(2). Neither the failure to make the contributions nor the use of Burruss's funds for other purposes concealed the existence of Burruss's obligations or impeded the plans' trustee from taking action to enforce those obligations. Thus, petitioners' failure to pay the contributions when due

and their use of company funds for other purposes did not convert the plans' contractual rights to the contributions in violation of Section 664.

Any other conclusion would be contrary to the long-standing common-law rule that a debtor's failure to pay its debt does not constitute conversion. See *McKee*, 299 U.S. at 122 ("The bankrupt was a debtor which had failed to pay its debt. We know of no principle upon which that failure can be treated as a conversion of property held in trust."); Restatement of Torts § 242 cmt. f (noting the "prevailing view that there can be no conversion of an ordinary debt not represented by a document"). Moreover, if petitioners' conduct violated Section 664, then employers could be criminally liable any time they failed to make its ERISA contributions in a timely manner. If Congress had intended such a dramatic departure from common law principles and historical practice, it would have made that intent clear.

The evidence at trial also showed that petitioners lied to the plans' trustee about their intent to make the contributions and about whether they had made the contributions. In addition, petitioners misled plan participants by distributing account statements indicating that the contributions had been or would be made. See pp. 4-5, *supra*. Whether or not misstatements of that kind can interfere so significantly with a plan's exercise of its contractual right to contributions that they constitute conversion, petitioners' misstatements did not do so here. The trustee vigorously pursued the contributions despite the misstatements. The trustee sent Burruss a letter complaining about the failure to pay just a few weeks after the contributions were due, despite petitioners' lies to the trustee about whether the payments had been made. Pet. App. 14-16; C.A. App. 729-733. Bur-

russ filed for bankruptcy protection approximately three weeks later, Pet. App. 19, and, at that point, the plan could pursue its right to the contributions only through the bankruptcy process. Accordingly, the government failed to prove that petitioners converted ERISA plan assets in violation of Section 664.[3]

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[3] If petitioners were acting as plan fiduciaries when they misled the plans' trustee and participants, petitioners' conduct might be analogized to the situation in *Uzzolino* where a plan fiduciary converted the plan's contractual right to employer contributions by intentionally causing the plan to refrain from collecting the contributions. See *Uzzolino*, 651 F.2d at 209. The government has not established, however, that petitioners were acting as fiduciaries, rather than as agents of the employer, when they made the misstatements about Burruss's intent to make its contributions. See *Pegram* v. *Herdrich*, 530 U.S. 211, 225 (2000) (under ERISA, a person may wear "two hats," one as employer and one as plan fiduciary, but he "wear[s] only one at a time," and he acts as fiduciary only when exercising fiduciary responsibilities). Generally, a person acts as an ERISA fiduciary only "to the extent" he actually exercises "authority or responsibility" over plan "assets" or "discretionary authority or discretionary control" in the plan's administration. 29 U.S.C. 1002(21)(A). And the government did not argue at trial that petitioners were fiduciaries, the jury was not instructed that it had to find that petitioners were fiduciaries in order to find them guilty of violating Section 664, and the courts below upheld petitioners' convictions based on the premise that Section 664 did not require proof that they were fiduciaries. See Pet. App. 28-29, 50-51; C.A. App. 2220-2222.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings in light of the position expressed in this brief.

Respectfully submitted.

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JANUARY 2009

No. 08-263

Supreme Court, U.S.
FILED
FEB 2 - 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

JOHN ALVIS JACKSON, JR.
and
LARRY ANDREW CAREY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF OF THE PETITIONERS

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QUESTION PRESENTED

WHETHER AN UNPAID EMPLOYER CONTRIBUTION TO A COMPANY'S EMPLOYEE BENEFIT PLAN, SUCH AS A PENSION OR RETIREMENT PLAN, BECOMES AN ASSET OF THE PLAN BEFORE IT IS PAID INTO THE PLAN SUCH THAT AN OFFICER OF SUCH COMPANY CAN BE CONVICTED OF EMBEZZLING FROM THE PLAN WHEN THE COMPANY FAILS TO TIMELY FUND THE PLAN?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 08-263

JOHN ALVIS JACKSON, JR. AND
LARRY ANDREW CAREY,
PETITIONERS,

V.

UNITED STATES OF AMERICA,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF OF THE PETITIONERS

In its Response Brief, the United States agrees with the Petitioners that unpaid employer contributions to an ERISA plan are not assets of that plan absent a contractual provision to that effect and that therefore the Petitioners cannot be guilty of embezzling plans' assets by failing to timely fund The Burruss Company's retirement plans. The United States concludes that "the petition for writ of certiorari should be granted, the judgment of the Court of Appeals should be vacated, and the case should be remanded for further proceedings ...". Br. Resp. 25. The Respondent states that "the government failed to prove that petitioners converted ERISA plan assets in violation of Section 664" as alleged in Counts 11 and 12 of the Indictment. Br.

Resp. 24. Thus, the Petitioners' convictions for these Counts must be reversed.

Therefore, for the reasons stated in their Petition for Writ of Certiorari, the Petitioners join the United States' request to grant their petition, to vacate the decision of the Forth Circuit Court of Appeals, and to remand for further proceedings.

CONCLUSION

For the reasons set forth in their Petition for Writ of Certiorari, Petitioners request that this Petition for Writ of Certiorari be granted, that the judgment of the Fourth Circuit Court of Appeals be reversed with directions that the cases be remanded to the United States District Court for entry of judgment of acquittal as to Counts Eleven and Twelve as well as a re-sentencing of the Defendants because acquittal on these counts will affect the United States Sentencing Guidelines calculations.

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